

CASES DETERMINED
IN THE
SUPREME COURT
OF
The State of Missouri
AT THE
OCTOBER TERM, 1884.

YOUNG V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
Appellant.

Railroads: DUTY TO FENCE: LIABILITY. Where a railroad company has once erected fences on the sides of its road, as required by law, it is only liable for negligent failure to maintain such fences, and it is entitled to a reasonable time in which to make repairs, after having knowledge of defects therein, or after such time has elapsed in which, by the exercise of reasonable diligence, it could have had knowledge of such defects.

Appeal from Shelby Circuit Court.—HON. THEODORE BRACE,
Judge.

REVERSED.

Geo. W. Easley for appellant.

The action being for double damages, the plaintiff's instruction improperly placed the plaintiff's right to recover on the fact that the fence was out of repair at the time of the injury. The defendant offered in its instructions to submit the question of its negligence, in failing to maintain the fence, to the jury. The giving of plaintiff's instruction and the refusal of defendant's second one was error. *Clardy v. Railroad Co.*, 73 Mo. 576; *Case v. Railroad Co.*, 75 Mo. 670.

C. M. King for respondent.

HOUGH, C. J.—This is a suit to recover double damages for the killing by defendant's engine and cars, of plaintiff's cow, in consequence of defendant's alleged failure to maintain a good and sufficient fence as required by law. The plaintiff recovered judgment before the justice, and in the circuit court, and the defendant has appealed.

It sufficiently appears from the testimony that the animal in question came upon defendant's road and was killed at a point where it was required by law to erect and maintain fences, and a fence had been erected at said point, but, at the time said cow entered, said fence was broken down, with the exception of one board. When the fence was so broken down does not appear, nor does it appear that the defendant had knowledge of the defect, or that by the exercise of reasonable diligence it could have discovered the same in time to have repaired it before the injury complained of. The court instructed the jury that the defendant was liable if the cow got upon defendant's track and was killed thereon, at a place adjoining inclosed or cultivated fields, where defendant at the time did not have a lawful fence. The defendant requested the court to instruct the jury that, if they believed from the evidence it had erected fences on the sides of its road where plaintiff's cow

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got upon the track, and that the fence at the point where the cow entered was down, with the exception of one board, still the plaintiff could not recover, unless it further appeared that the defendant knew that the fence was down, or that the same had been down for such a length of time as to have enabled the defendant, by the exercise of ordinary care to have known that it was down. This instruction was refused.

In the case of *Clardy v. Railroad Co.*, 73 Mo. 576, it was held by this court that "after fences have once been erected, as required by law, the company is only liable for a negligent failure to maintain such fences, and it is, therefore, entitled to a reasonable time in which to make repairs, after having knowledge of a defect therein, or after that period has elapsed, in which by the exercise of reasonable diligence, it could have had knowledge of such defect." This rule has been re-announced in the following cases: *Case v. Railroad Co.*, 75 Mo. 670; *Chubbuck v. Railroad Co.*, 77 Mo. 592; *Rutledge v. Railroad Co.*, 78 Mo. 286; *Silver v. Railroad Co.*, 78 Mo. 528; *Walthers v. Railroad Co.*, 78 Mo. 617. As it appears that the defendant had once erected fences on the sides of its road, at the point in question, it could only be held liable for a negligent failure to maintain such fence, and it devolved upon the plaintiff to introduce some testimony from which it could, at least, be fairly inferred by the jury that the defendant had been guilty of negligence in this particular. *Chubbuck v. Railroad Co.*, 77 Mo. 592. The circuit court erred, therefore, in refusing the instruction asked by the defendant, and for this error its judgment must be reversed and the cause remanded. The other judges concur.

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SIELA V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
Appellant.

1. **Master and Servant; MACHINERY: NEGLIGENCE.** An employer should furnish to his servants good, safe and properly constructed machinery and implements for carrying on his business. By this, however, it is not meant that he is an insurer of their safety and under an absolute obligation to provide safe machinery and implements, but only that he is to use reasonable care and precaution in procuring them and in keeping them in good order.
2. The doctrine applied to a case where the defendant furnished its servant with a defective hand car, and a series of instructions approved.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

AFFIRMED.

George W. Easley for appellant.

The demurrer to plaintiff's evidence should have been sustained. The master is not chargeable for defects in machinery causing injury to the servant, unless negligence or fault can be imputed to the master. Wood on Master and Servant, §§ 344, 382; Roberts & Wallace's Liability of Employers, (2 Ed.) 113, 169; *Scott v. London Dock Co.*, 34 L. J. Ex. 220; *Schultz v. Railroad Co.*, 64 Mo. 32. The first and second instructions given for plaintiff submit issues not embraced in the pleadings, and upon which no evidence was offered. *Waldhier v. Railroad Co.*, 71 Mo. 514; *Price v. Railroad Co.*, 72 Mo. 414; *Edens v. Railroad Co.*, 72 Mo. 212; *Bullene v. Smith*, 73 Mo. 151; *Ely v. Railroad Co.* 77 Mo. 34. In all the instructions given by the court, both for plaintiff and of its own motion, the question, what constitutes negligence and care, was left, both law and fact, to the jury, which was error. *Goodwin v. Railroad Co.*, 75 Mo. 75; *Yarnell v. Railroad Co.*, 75 Mo. 583; *Zimmerman v. Railroad Co.*, 71 Mo. 491. The opinions of plaintiff's

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witnesses that the handle was made of improper wood, "would have no appreciable weight in the scale of evidence" if the witness Groff applied the tests he testified he did. *Warner v. Railroad Co.*, 39 N. Y. 468; 1 Redfield R'y Cases, 403; Pierce on R. R., p. 371; *Hough v. Railroad Co.*, 100 U. S. 218.

James W. Boyd for respondent.

The demurrer to the evidence was properly overruled. If the handle was defective at the time of its construction, and so continued when put to use, it was not necessary to show further notice or knowledge on part of defendant. *Greenleaf v. Railroad Co.*, 29 Ia. 14. It was the duty of defendant to furnish suitable machinery. *Long v. Railroad Co.*, 65 Mo. 224; *Lewis v. Railroad Co.*, 59 Mo. 495; *Porter v. Railroad Co.*, 71 Mo. 66; *Gibson v. Railroad Co.*, 46 Mo. 163. The instructions do not involve any questions not embraced in the issues. Appellant's motion for a new trial does not refer to the instructions given by the court, on its own motion; hence the fourth specification in appellant's assignment of errors is not relevant. "The conclusion reached by the jury is manifestly right, and a different result could not have been reached by them, without manifest injustice, therefore, the verdict ought not to be disturbed." *Noble v. Blount*, 77 Mo. 235; see p. 239; *Blewett v. Railroad Co.*, 72 Mo. 583. On the entire case, it is apparent, that the rulings of the trial court were very favorable to appellant, and that appellant has no reason to complain of the result.

NORTON, J.—This action was commenced in the circuit court of Buchanan county to recover damages for personal injuries received by plaintiff in consequence of being thrown from, and run over by a hand car, by reason of the breaking of a handle thereof on which plaintiff was working as the servant of defendant.

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The petition alleges among other things, the following as the cause of action :

"That prior to the time plaintiff was injured, the defendant carelessly and negligently furnished to plaintiff for his use in and about said work upon defendant's track, a hand car which was unsafe and dangerous and unfit for use; that said unsafe and dangerous condition of said hand car were known to defendant prior to the time when it was furnished to plaintiff, and until plaintiff was injured *
* but were never known to plaintiff until he was injured
* * that on, etc., plaintiff was, etc., when the lever and handle of said car, in consequence of said negligent and careless construction, and unsafe and dangerous condition, broke, and by breaking threw plaintiff," etc. The answer of defendant was a general denial.

Plaintiff on the trial obtained judgment for \$1,500, from which the defendant has appealed, and the first error assigned and relied upon is the action of the court in refusing to give an instruction, at the close of plaintiff's evidence, that he was not entitled to recover. Plaintiff introduced as a witness the section foreman, who on the day of the accident, with four hands, the plaintiff being one of them, were operating a hand car on defendant's road. He testified that: "We were going west over the railroad of defendant on a hand car; we had no load on the hand car; while so employed the handle of the car broke, and plaintiff was thrown off and run over by the car; * * the handle broke square off; the handle is made of what I call brash oak, that is brittle wood; I had been using the car about two weeks; it came to me about two weeks before the accident from the car shops at Hannibal; the car had been repaired at the shop; * * the handle which broke was in the car when it came to me, and was new; the plaintiff is near-sighted." On his cross-examination he said all the men stood with their faces in the direction we were going except the plaintiff; he stood in front of the outside of the handle, and with his back in the

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direction we were going; the handle broke while he was pulling on it, and his back being in the direction we were going, he of course fell off the car; the car handle is much more likely to break when pulling up than when pushing down; the strain on it is much greater. I don't think there is any proper place for a man on a hand car. I left that to him; if he had been inside the handle and looking in the direction we were going he would not have been thrown off the car; the handle seemed when it came to me 'to have been painted.' Dr. Simmons testified as to the nature of the injury.

Kessler, another witness, testified: I was on the hand car at the time of the accident; we were going west and the plaintiff was working one side of the forward handle of the hand car. The handle broke square off the side plaintiff was working, and he fell backward on the track and the car passed over him. I think he was pulling on the handle when it broke; the handle is much more liable to break when the workman is pulling than when he is pushing it; the plaintiff stood outside, and in front of the handle of the car. Standing outside, or in front of the handle is a more dangerous position than standing inside * * The way the handle broke he would not have fell off if he had been standing as we were; if it had been broken when he was pressing down on the handle, and he had been standing with his face the way we were going, he would then have fallen on the track, and the other position he did occupy would have been safer.

Patrick Brady was introduced and testified as follows: "I have been railroading as section hand and section foreman for eighteen years; a great part of the time I was in defendant's employ as section foreman; I am not now; I have known the plaintiff for about twenty years; he worked for me on the defendant's railroad when I was section foreman for about two years, off and on; the first place a man gets on a hand car is the proper place to work in running it; I have never known or made any difference in regard to

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places where a man should stand in running a hand car."

On cross-examination this witness said: "When a man is standing on a car, as Siela was, if the handle breaks when he is pushing down he is safe; if it breaks while he is pulling up he will fall off in front of the car; I think a handle is as likely to break pulling up as pushing down, and pushing down as pulling up; when pushing down he puts his whole weight on the handle, and the position plaintiff occupied when the accident happened was safer than that occupied by the other men on the car, if the handle had broken when being pushed down; I did not see the accident."

Plaintiff, after stating in his evidence that he had not been able to work since the accident, and that he was sound and well before, said: "I always, when on the hand car occupied the position I did the morning I was hurt; I took it from choice; I am very near-sighted, and did not observe any defect in the handle, or that it was made of brash wood before I was hurt; I thought it was a good handle, and could not see any defect in it; I could not tell whether it was light or heavy wood as it was fastened in the lever."

Mr. Arnold, introduced on part of plaintiff, testified as follows: "I am a carpenter by trade and familiar with wood of different kinds (the broken car handle being identified was here shown to the witness who then said): This is a brittle piece of wood and not fit for the uses to which it was put; I can tell from the color of the wood, its grain and weight, that it is brittle."

Mr. Frick, introduced on part of plaintiff, testified as follows: "I work in wood and am familiar with all kinds; made car handles for several years; this handle (the broken handle here shown witness) is made from wood of an old tree; it is not fit for car handles or any severe work; when such wood breaks it breaks square off; when made from a younger tree it splits; the handle was very brittle

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and was made out of very inferior timber; hand car handles should be made of the best kind of timber.

This was all the evidence offered by plaintiff and we think it made out a *prima facie* case for plaintiff under his petition, and that defendant's demurrer to the evidence was properly overruled. There can be no question but that it was the "duty of defendant to furnish for its servants good, safe and properly constructed machinery and implements for carrying on its business * * . By this, however, it is not meant that he is an insurer of their safety, and under an absolute obligation to provide safe machinery and implements, but only that he is to use reasonable care and precaution in procuring them, and in keeping them in good order and condition." *Porter v. Han. & St. Joe R. R. Co.*, 71 Mo. 67; *Long v. Pacific R. R. Co.*, 65 Mo. 225; *Lewis v. St. L. & I. M. R. R.*, 59 Mo. 495.

The evidence tended to show that the handle was made of brash, brittle wood and unfit to be put to such use, as shown by its color, weight and grain; it also tended to show that in consequence of the defendant's near-sightedness, the painting of the handle and its attachment to the hand car, the defective character of the wood or handle could not be discovered by him till after it broke. The defective quality of the wood in the hands of defendant's workmen who made and put it in the car, was quite as discoverable to them as it was to those who saw it after the accident. If, at the time the handle broke, it was brash, brittle wood and unsuited for car handles, the conclusion necessarily follows that such was the character of the wood, when it was put in the car but two weeks before at defendant's shops, and that ordinary skill and observation on the part of defendant's servants, who made and put it in, would have informed them of that fact.

After the demurrer to the evidence was overruled defendant offered evidence tending to prove that the proper place for the plaintiff to have occupied on the car was be-

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tween the handles with his face in the direction the car was going, and had the plaintiff occupied such position he would not have been injured by the breaking of the handle.

Mr. Groff, introduced on behalf of defendant, testified as follows: "I live at Hannibal in this State; I am a workman in the car shops of defendant at that place; I build and repair all of defendant's hand cars; after completing a hand car and after repairing one I test it thoroughly before sending it on the road for use; I do this under orders; the test consists in putting the car on a railroad track near the shop, load it with from one to two tons of railroad iron and running it up and down the track with such load; I never fail to do this with all care, and am satisfied I tested this one in that manner; I have been in defendant's employ in my present capacity for seventeen years."

On cross-examination this witness said:

"I make the handles out of oak and sometimes of ash and sometimes I use blackjack; each handle is tested by me before being put in the car; the test consists in putting it in a vice and pulling and pressing on it; when satisfied that the wood is good and sound it is thrown in a pile with others for use; I test sometimes a dozen handles in twenty or thirty minutes; the handles are intended to be made of best material; there are four or five railroads coming into Hannibal and none of them use iron handles on their hand cars."

This was all the evidence and we have inserted it in order to an intelligent disposition of the objections of counsel to the action of the court in giving and refusing instructions.

The instructions given on behalf of plaintiff are as follows: The court, on motion of plaintiff, instructs the jury that if they believe from the evidence that on or about July 21, 1881, plaintiff was in the employment of the defendant, and that while in the discharge of his duties as such employee, he was, without carelessness or negligence on his

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part which contributed directly thereto, thrown from defendant's hand car and injured by reason of the breaking of the handle or lever of said hand car; that said handle or lever of said hand car was at said time defective and unsafe; that the defective or unsafe condition of said handle or lever was unknown to plaintiff, and could not have been known by ordinary care or caution on his part, but was known to defendant, or might have been known by defendant by the exercise of reasonable caution and diligence on the part of defendant, then the jury will find for the plaintiff.

If the jury believe from the evidence that the hand car mentioned in the petition was, at the time it is alleged that plaintiff was injured, in a defective or unsafe condition, and that the agents or servants of defendant whose duty it is to inspect or repair its hand cars knew, or by the exercise of reasonable care and diligence might have known, such condition of said hand car, then such knowledge is the knowledge of defendant and the neglect or failure to obtain such knowledge is the negligence or failure of defendant. That it was the duty of defendant in constructing and repairing its hand cars for the use of its employes to exercise care and skill in repairing and in selecting the materials with which to repair said hand cars.

If the jury find for plaintiff they will assess his damages at such sum as will compensate him for the injuries he has sustained, taking into consideration the pain and anguish, mental and physical, he has endured, not to exceed \$5,000.

It was not incumbent upon plaintiff while in defendant's employ to search for latent or hidden defects in the implements furnished to him by defendant, unless by ordinary care and caution the defect could have been discovered to plaintiff, he had a right to assume that the hand car furnished for his use by defendant was safe and sufficient for the purpose of his employment

Defendant asked the following:

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1. The jury are instructed that under the pleadings and evidence in this case the plaintiff cannot recover.

2. If the jury believe from the evidence that the proper or safe place for a man on a hand car who is working at the handle of the car as plaintiff was, is between the handles, or that such position is less dangerous than the one occupied by the plaintiff at the time he was injured, then the plaintiff cannot recover, and the jury must find for defendant, although they may believe that the handle in proof was defective or made of poor and defective material.

3. If the jury believe from the evidence that plaintiff's injuries were caused by a negligent or dangerous position occupied by him on the car, or that he would not have been so injured if he had occupied a position between the handles of the car, and further believe that the position occupied by him was voluntarily assumed and was more dangerous than a position between the handles, they must find for defendant, although they may believe that the car handle in proof was defective or made of poor and defective material.

5. The jury are instructed that while the defendant must use care and diligence to supply his employes with good and safe machinery and appliances, it does not warrant the soundness of such machinery or appliances, and if the jury believe from the evidence that due care was used by defendant's employes in the selection, construction and testing of the car handle in proof a short time before the same was furnished for use, and that the defective quality in the wood of the car handle was not discoverable by such recent careful inspection and test, they must find for defendant.

6. If the jury believe from the evidence that the car handle in proof was of new material and was put in the car only two weeks before the injury sued for, that it was inspected by the proper employes of defendant before it was used, and that after it was put in the car and before the

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car was placed on the railroad for use, the strength of the handle was thoroughly tested by such employes and that such tests showed no defect in the handle, they must find for the defendant.

The court gave the instructions numbered 3 and 5, as prayed, but refused to give the instructions numbered 1, 2 and 6, to which order and ruling of the court defendant excepted at the time.

The court on its own motion gave the following instructions to the jury:

The court instructs the jury that as a matter of law the defendant is not bound to provide its employes with machinery absolutely safe. The law imposes upon defendant as an employer only the obligation to use reasonable and ordinary care, skill and diligence in procuring and furnishing suitable and safe machinery.

When plaintiff entered into the service of defendant, he thereby undertook to use all the ordinary risks incident to his employment including his own negligence. It was plaintiff's duty as a servant of defendant to use all reasonable care and diligence to see that the machinery daily used by him in the performance of his duty was in fit condition for use, and report the defects which were apparent, if any, to the company, and if he did not do so it was negligence on his part.

Although the hand car furnished by the defendant for the use of plaintiff and his section gang was unsafe, yet if the plaintiff knew the character and weakness of the lever of the hand car, or might by ordinary care have known it, and yet continued to use it and work with it, he was bound to exercise care and caution reasonably connected with the danger to be feared, and if he failed to do so and in consequence thereof received the injury complained of, he cannot recover from defendant on account of such injury.

It is insisted by counsel that the first instruction given for plaintiff is erroneous in that it submits an issue not

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presented by the petition and authorized a recovery for a defect arising after the car left the shop at Hannibal. We do not think the instruction is such a departure from the cause of action stated in the petition, as is referred to in the class of cases of which the case of *Waldhier v. H. & St. J. R. Co.*, 71 Mo. 514, is a representative. It is alleged in the petition that defendant furnished for the use of plaintiff "a hand car which was negligently and carelessly constructed, and which was unfit for use; that said dangerous condition, and negligent construction were known to defendant prior to the time it was furnished and unknown to plaintiff." The instruction tells the jury that in order to find for plaintiff, they must believe that the car handle was defective and unsafe, that this was unknown to plaintiff, and could not have been known by ordinary care and caution, but was known or might have been known to defendant by ordinary care. The instruction when read in connection with the fifth given for defendant, and the first one given by the court of its own motion, is unexceptionable, and what is said of this instruction applies to the second of plaintiff's instructions.

There was no error in refusing defendant's first instruction for the reason heretofore given, nor was error committed in refusing the second instruction, inasmuch as the third instruction which was given covered the same ground. No point has been made on the refusal of the court to give the fourth instruction, which for that reason is not incorporated herein. The sixth instruction might well have been refused on the ground that the principle which it announced was sufficiently and clearly embraced in the fifth instruction; and on the further ground that it ignored the fact established by the evidence of Mr. Arnold that the wood of which the handle was made was unfit for the use to which it was put, and that this fact was discoverable from its weight, its color, and its grain.

The instructions, taken together, presented the law of the case fairly to the jury, and we perceive nothing in the

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record justifying an interference with the judgment, and it is hereby affirmed with the concurrence of the other judges.

CORYELL V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
Appellant.

Railroad: Double Damage Act. A railroad, in an action under the double damage act for killing stock, cannot base a defense on the condition of the fence at a place other than where the animal escaped on the track.

Appeal from Clay Circuit Court.—HON. GEORGE W. DUNN,
Judge

AFFIRMED.

George W. Easley for appellant.

(1) The second instruction asked by the defendant should have been given. The place where the animal got through or over the fence, was the one to inquire about, not other places. *Nance v. Railroad Co.*, 79 Mo. 196. (2) The third instruction asked by defendant should have been given. It was not shown that defendant knew or ought to have known that dirt had washed against the fence, so as to allow the animal to get over. *Clardy v. Railroad Co.*, 73 Mo. 576. Besides, if the fence was on the line between the plaintiff's land and the defendant's right of way, the defendant could not enter and dig away the dirt that had washed against the fence. Plaintiff should have moved it if on his premises. Certainly the defendant could not without his consent.

Wm. J. Courtney and Simrall & Sandusky, for respondent.

(1) The declaration of law, No. 1, given for defend-

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ant, and the declaration of law given by the court on its own motion cover all the law involved in the case, and there is no error. (2) There was no error in refusing declaration of law No. 2, asked by defendant, for the reason that the declaration given by the court covered the same point. (3) There was no error in refusing declaration of law, No. 3, asked for by defendant, for the reasons that said declaration contained a comment upon the evidence, and assumed facts that were in issue, and was not authorized by the evidence in the case nor by the law.

EWING, C.—Suit before a justice of the peace for killing plaintiff's mare. Judgment before the justice and also in the circuit court for the plaintiff, and the case is brought here by the defendant. On the trial in the circuit court the evidence tended to show the ownership of the mare; that she got over defendant's fence and was killed by defendant's cars. That the fence was broken at two places, at one of which the fence was four and a half feet or more high on both sides, and that at the other it was only four feet high next to plaintiff's place, inside of his pasture, which was caused by a wash of the earth against the bottom plank. The evidence tends to show that the mare got on the track at the broken place where there was no wash and where the fence, before broken, had been four and a half feet or over high. The evidence tended to show that the fence was made of good, sound substantial cedar posts and boards, and also, that the posts were sound but would not hold nails on account of some cracks, and because of having had so many nails driven into them. The evidence was conflicting as to the condition of the fence. It tended to show that it was good and, also, that it was not substantial. Upon this state of facts the defendant asked the following instructions:

1. That a fence four and a half feet high, made of sound cedar posts and five plank or boards, five or six inches in width and well constructed, is a lawful fence.

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2. That if the fence, at the point where the animal sued for broke the same and got upon the railroad track, was such as is described in the first instruction, the finding must be for defendant, notwithstanding the fence near said point was not four and a half feet high.

3. The fence in proof, when built being of the character described in the first instruction, and being at the time of the injury sued for changed only in the matter of height, and in that respect only on the out or farmer's side thereof, by a fill caused by the washing of dirt against it, which fact was known to plaintiff at and before the injury sued for, and was not communicated by him to defendant's employes or any of them, the finding must be for defendant.

Of which the court gave the first and refused the other two, but of its own motion gave the following:

That if the fence at the point where the animal sued for broke the same and got upon the railroad track, was such as is described in the first instruction, the finding must be for defendant.

The appellant insists that its second instruction should have been given. The refusal of this instruction was not error. It ought to have been refused on account of the last clause. But the court of its own motion gave this instruction word for word except the last clause, which cuts no figure in the case. The third instruction was properly refused because it was predicated upon the condition of the fence at a place other than that where the mare got on the road. It was offered upon the facts proven that when the fence was only four feet high it was caused by a wash on the plaintiff's side of the fence, and which the evidence shows was not the place where the mare crossed the fence and got onto the track. Hence it was properly refused. The question then recurs whether there was any evidence tending to show that the fence was defective at the place where the mare got over it; and we think there was such evidence as would authorize the submission of the question to the jury; and they, under proper instructions, having

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found for the plaintiff, it is not for this court to weigh the evidence and say whether their verdict was justified or not.

The judgment below is affirmed. All concur.

DOOLEY v. THE CITY OF KANSAS, *Appellant*.

Municipal Corporation: TRESPASS: PEST-HOUSE. Where a city, which is authorized by its charter to purchase property beyond its limits for a pest-house, seizes property for that purpose without the consent of the owner, it is liable in damages for the trespass.

Appeal from Jackson Circuit Court.—HON. F. M. BLACK, Judge.

AFFIRMED.

Wash Adams and R. H. Field for appellant.

The petition states no cause of action against appellant, for it charges appellant with an act that it was not and is not capable of committing. *Rowland v. City of Gallatin*, 75 Mo. 136; *Dillon on Munic. Corp.* (3 Ed) §§ 89, 561, 565; *Hanny v. Rochester*, 35 Barb. 177; *Field v. Des Moines*, 39 Ia. 575; *Mitchell v. City of Rockland*, 52 Me. 118.

Gage, Ladd & Small for respondent.

The establishment and keeping of the pest-house were within the scope of the purposes for which the city was organized, and the fact that the act was done at an improper place or in an unlawful manner creates the liability of the city. *Soulard v. St. Louis*, 36 Mo. 546; *Hickerson v. Mexico*, 58 Mo. 61; *Lee v. Sandy Hill*, 40 N. Y. 447; *Dillon on Munic. Corp.* 769; *Hunt v. Boonville*, 65 Mo. 620.

HENRY, J.—By this suit the plaintiff seeks to recover damages from defendant for a trespass upon a tract of land

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owned by him, without the limits of the city. In the spring and summer of 1881, the small-pox was prevailing in the City of Kansas, which had no pest-house, and the patients were sent out, in charge of the city police and city physician, and placed in tents by the road-side, in the river bottom, east of the city. The neighbors there compelled the removal of the camp by violence, and the physician and police finally took possession of plaintiff's premises, where they remained from June until the last of August, under control of officers constituting the city board of health. The expenses of this camp were paid by the city, under ordinances authorizing it. Plaintiff obtained a judgment, from which the city has appealed.

The principal question for consideration, is whether the city is liable on the above facts. It is contended by her counsel in an ingenious argument that the city was not authorized to acquire property for use as a pest-house, except by purchase, and that the occupancy of plaintiff's premises was *ultra vires* and, therefore, the city cannot be held liable for the trespass. The argument is more specious than sound. If a city can be held liable for no act which it is not authorized to perform, then since no city charter authorizes it to perpetrate a wrong, no town or city can ever be held liable for a tort authorized by it. To the contrary, are *Hunt v. Boonville*, 65 Mo. 620; *Thompson v. Boonville*, 61 Mo. 283 and *Soulard v. St. Louis*, 36 Mo. 546. In the latter case the city of St. Louis proceeded to appropriate private property, for street purposes, without observing the mode prescribed by its charter for acquiring it. It was held to have been done "without authority of law; it was wrongful and amounted to a trespass;" and the following was announced as the law on the subject: "A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done by its command by its agents, in relation to a matter within the scope for which it was incorporated.

The City of Kansas by its charter is authorized: "To

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purchase and hold property, real and personal, beyond the limits of the city, to be used for the erection of pest-houses, for the reception of persons afflicted with contagious, or other loathsome diseases." Instead of purchasing property for that purpose, she proceeded to seize the property in question, just as the city of St. Louis took possession of the property of a citizen for street purposes, without regard to the prescribed formalities for its acquisition. The city of St. Louis was held liable as a trespasser. *Soulard v. The City, supra*. We are unable to perceive a distinction, in principle, between an unlawful seizure, under the power of condemnation, and such a seizure under a power to purchase. They are but different modes of acquisition. The property taken by the City of Kansas was for a purpose sanctioned by its charter, and every thing was done in accordance with the charter and ordinances, except the acquisition of the land. It was a case of emergency, admitting of no delay. A pest-house was an immediate necessity. The entire population of a great city was concerned in preventing the spread of a contagious disease, and the action of the city, in occupying plaintiff's premises, was within the scope of one of the purposes for which the city was incorporated, although the premises were not acquired in the manner prescribed by its charter. It is impossible to distinguish this case from the previous adjudications of this court, holding cities liable for torts authorized by it. Counsel, we think, misconceive the case of *Rowland v. The City of Gallatin*, 75 Mo. 134. There the street commissioner of the city of Gallatin, without any authority except the verbal direction of the mayor, entered upon plaintiff's land and dug a ditch for the purpose of constructing a highway over it, and this court held the city not liable. Certain remarks found in the opinion delivered applicable alone to that case, are regarded by appellant's counsel as having overruled the cases above cited; although two of them, *Hunt v. Boonville* and *Thompson v. Boonville*, are approvingly, cited in the opinion and the opinion delivered in *Hunt v. Boonville*

was written by the same judge who delivered the opinion in *Rowland v. City of Gallatin*.

It is contended that proof of notice of the common council, that the trespass complained of had been committed, is altogether lacking. The following instruction given by the court, predicated upon evidence adduced, we think, fairly and clearly declared the law on that subject :

If the jury believe, from the evidence, that the property of plaintiff described in the petition, was taken possession of and used from the 17th day of June, 1881, to about the middle of August following, as a camp for the keeping and treatment of persons sick with the small-pox by persons in charge of such patients by the city physician of the City of Kansas, and that such occupation of such premises was immediately thereafter known to the city physician, the mayor and other members of the board of health, and not disapproved of by them, and that the City of Kansas, by its council and other financial officers, knowing of the existence of such small-pox camp under a pretense of authority from said city, although they may not have known the precise location of said camp, appropriated the money of the city to pay all the expense of attendants upon patients at said camp upon plaintiff's said premises, and of supplying the same with provisions and other necessities, then the jury will find their verdict for the plaintiff.

Numerous other questions are raised in briefs of counsel, which we have not deemed it necessary to discuss in this opinion. We have given them attention, and are satisfied, that the court committed no material error in the trial of the cause, and the judgment is affirmed. All concur.

BENNETT, *Administrator*, v. SHIPLEY *et al.*, *Plaintiffs in Error*.

1. **Deed of Trust, Acknowledgment of.** A deed of trust acknowledged before the trustee therein, where its execution is duly proved, is good between the parties thereto and those claiming under them.
2. **Vendor's Lien: PURCHASE MONEY.** A vendor's lien upon land for the purchase money therefor exists independent of any agreement to that effect between the contracting parties.
3. **Exchange of Lands: DEED OF TRUST, TRANSFER OF: EQUITY: VENDOR'S LIEN: HOMESTEAD: DOWER.** Where B. and D. exchanged lands, D. promising to transfer a deed of trust, in which his wife had not joined, from the land traded B. to that received from B., but died insolvent without making the transfer, and B. lost the land obtained from D. by sale under the trust deed, equity will give B. a lien on the land traded to D. for the purchase price thereof, and the homestead and dower right of D.'s widow will be subject to such lien. But B. having quit-claimed to the *cestui que trust* for \$500, after the trust sale, for the purpose of divesting the widow of her dower, his vendor's lien will be reduced that amount.

Appeal from Harrison Circuit Court.—HON. S. A. RICHARDSON, Judge.

AFFIRMED.

D. S. Alvord for plaintiffs in error.

Plaintiff ought not to recover for the reason that the record shows that plaintiff's intestate had full notice of the Dyer incumbrance on the land Dyer traded to him, and that he depended upon Dyer removing same. Both parties having equal knowledge of the condition of title, there was no fraud. See Kerr on Fraud and Mistake, p. 233. The defendant, Lucinda Shipley, had a right to hold said land under the homestead laws of the State of Missouri.

D. J. Heaston for defendant in error

The deed of trust given by Dyer was an incumbrance on the land, and was properly made a lien on the land Dyer got from Bennett, as for that much purchase money. *Pratt*

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v. Clark, 57 Mo. 189; *O'Neill v. Capelle*, 62 Mo. 207; *Close v. Graham*, 64 Mo. 249; *Blackburn v. Tweedie*, 60 Mo. 505; *Dail v. Moore*, 51 Mo. 591; *Steward v. Wood*, 63 Mo. 255; 2 Story Eq. Jur., (8 Ed.) §§ 1218 to 1225; 4 Kent Com., (9 Ed.) top p. 170, side p. 152; 2 Washburn Real Prop., (4 Ed.) p. 506, §§ 87, 88; *Pratt v. Eaton*, 65 Mo. 157; *Skinner v. Purnell*, 52 Mo. 96; *Carter v. Holman*, 50 Mo. 498; *McQuie v. Peary*, 58 Mo. 58; *Cornet v. Bertelman*, 61 Mo. 118. Although Slatten's deed of trust was acknowledged before the trustee therein, yet it was good as against Dyer and those claiming under him, and all others having actual notice. *Black v. Gregg*, 58 Mo. 565. Mrs. Dyer could have no dower in preference to the purchase money. Wag. Stat., 698, § 5; 51 Mo. 221; 57 Mo. 552; R. S., § 2188.

RAY, J.—Josiah Bennett instituted this proceeding in the circuit court of Harrison county, Missouri, at the March term, 1876. He died April 20th, 1877, and at the September term, 1877, his death was suggested and the action renewed in the name of his said administrator, Henry Bennett, the present plaintiff. The subject matter of the controversy grows out of an exchange of farms between said Josiah Bennett and one Joseph Dyer. The defendant, Lucinda Shipley, was formerly the wife and widow of said Joseph Dyer, and has since intermarried with said George Shipley. The said George W. Flint is the administrator of the estate of said Joseph Dyer. The other defendants are all the children and heirs of said Dyer and are all minors, except the defendant, Mary C. Stanley, formerly Mary Dyer, and intermarried with her said husband Hiram Stanley. The pleadings, so far as we think material, are in substance as follows: The amended petition alleges that on January 15th, 1872, Joseph Dyer, now deceased, owned the following lands in Harrison county, Missouri. The west half of the southwest quarter of section 11, township 64, range 26, and the northwest fractional quarter, west of Grand River, of section 13, same township and range.

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That Josiah Bennett owned the west half of the northwest quarter of section 30, township 65, range 26, and the west half of the northwest quarter of section 30, township 65, range 27, in said county. That on that day said Bennett and said Dyer traded their said farms, by which trade each was to convey to the other by warranty deed their said lands respectively, free of incumbrances. That on said January 15th, 1872, Bennett executed his deed to Dyer and that Dyer and wife executed their warranty deed on April 13th, 1872. That at the date of said trade there was on the land Dyer traded to Bennett an unsatisfied deed of trust to secure to one Joseph P. Slatten a note for \$1,587.50, and that it was agreed between Dyer and Bennett that Dyer was to change said deed of trust to the land Bennett traded to Dyer, and that there upon said deeds were exchanged, but that Dyer failed to effect said change of the trust deed. That Dyer died insolvent. That his widow afterwards married defendant, George Shipley; that said trust deed was foreclosed, and that by reason thereof, Bennett lost the land he got of Dyer. Judgment is asked against defendants for \$1,500, and for the enforcement of a vendor's lien against the land Bennett traded to Dyer.

The separate answer of said Lucinda Shipley, as far as material, is in substance as follows: It admits the death of the parties and subsequent marriage of Mrs. Dyer; it admits that the farms were exchanged and the deeds made, but claims the trade was made and deeds executed without any understanding that either party reserved a lien for the purchase price, or that the incumbrance on the Dyer land was to be removed, and with no contract or obligation other than what was contained in the covenants of the deeds. It then set up facts claimed to show the right of homestead in defendant, Lucy Shipley, to said west half of the southwest quarter section of section 11, township 64, range 26, which is part of the land involved in this suit. It charges further that she did not sign the trust deed to secure Slatten on the land traded by Dyer to Bennett, of which

her late husband was seized in fee with his title on record long prior to the date of the trust deed, and which was occupied as their homestead, and did sign the deed to Bennett expecting to have the same interest and rights as to homestead and dower in the land traded by Bennett to Dyer; that she had no notice of any incumbrance on her husband's lands, and that for the reason that she had not joined in the deed of trust said Slatten paid to Bennett \$500 to get her interest in the land traded to Bennett. It charges that said deed of trust was acknowledged by D. J. Heaston, the trustee therein, and was, therefore, void in law, constituted no notice to Bennett, and was no incumbrance on the lands embraced therein. There was a guardian *ad litem* appointed for said minor children, defendants, and their answer is in the usual form. The replication to the separate answer of Lucinda Shipley was a general denial of all its allegations.

From the pleadings and evidence we gather, the material facts to be as follows: The farms exchanged by Dyer and Bennett in January, 1872, were about eight miles apart, embraced about the same number of acres, and were, it seems, of about equal value. Each of them was to execute a warranty deed for the land by them owned. About a week after they had agreed to make the exchange, Dyer and Bennett went to town to execute the deeds, but found the notary absent from home. Dyer then gave Bennett the numbers of the land, with instructions to have the notary draw the deeds for him to execute when he came in. On January 15th, Bennett went to see the notary, who then drew up both deeds, both of which bear the same date; and Bennett then signed and executed his deed, and left it with the notary. On January 17th, two days afterward, the parties removed and changed the possession of their farms respectively. Dyer and wife executed and acknowledged their deed to Bennett, April 13th, 1872. It was filed for record March 24th, 1873, while Bennett's deed to Dyer was filed for record April 25th, 1873. These deeds were read

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in evidence by plaintiffs below, as was also a certain deed of trust on the land Dyer traded to Bennett, executed by Dyer alone, his wife, the defendant Lucinda Shipley, not joining therein. Said deed of trust was dated August 20th, 1869, was acknowledged before Heaston, the trustee therein, and filed for record the same day. It was given to secure a note for \$1,587 in favor of Joseph Slatten. Its admissibility in evidence was objected to by defendants on the grounds that it was acknowledged before the trustee therein, that it imparted no notice and was void in law. Upon proof by said Heaston and Slatten of its execution, that they saw the same as well as said note signed by said Dyer, the trust deed was admitted and defendants excepted. Plaintiff also read sheriff's deed of said land to said Slatten, made in pursuance of a sale under said trust deed and dated April 4th, 1874.

At the time of the trade and exchange of possession Bennett assured Dyer that his lands were free of all incumbrances, and Dyer said his were all right, and Bennett then had no knowledge of the existence of the trust deed. The proof shows, though the dates are not fixed with entire certainty, that before Dyer's deed was fully executed, but after their exchange of possession, Slatten told Bennett about the deed of trust and agreed to change the trust deed from one farm to the other, and that Dyer, whom Bennett then went to see about it, also said that he would have the trust deed transferred. A number of witnesses testified, against defendants' objection, to hearing Dyer say on different occasions that he would transfer the deed of trust, or that if Bennett lost his lands thereby he would deed back the lands Bennett traded to him.

About June 2nd, 1873, Dyer went away and was killed on the railroad. He died insolvent. The record of the probate court was offered, showing that the west half of the southwest quarter of section 11, township 64, range 26, being a part of that sought to be affected by this proceeding was set off to defendant, Lucinda Shipley, as a homestead.

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The land Bennett got from Dyer was sold under the Slatten deed of trust, and was thereby lost to Bennett. This suit was brought, as the petition discloses, to have the amount of said deed of trust declared a lien upon the land Bennett traded to Dyer. As we have said, Mrs. Dyer had not joined in the trust deed, and as Dyer was dead, Slatten got Bennett to quit-claim for \$500 the land to him, in order to get Mrs. Dyer's dower right. The quit-claim deed was read in evidence by defendants. The cause was submitted to the court without any declarations of law being asked by either party, and the court found for plaintiff, and gave a lien on the Dyer land for \$800, and from this judgment this writ of error is prosecuted.

The objections made on the trial, and urged here, that said deed of trust was inadmissible in evidence are not well taken. Although acknowledged before the trustee therein, yet execution thereof was duly proved, and it is well settled that it is good between the parties and those claiming under them. *Siemers v. Kleeburg*, 56 Mo. 196; *Black v. Gregg*, 58 Mo. 565. It seems to be the theory, in part, of the answer in this case that there could be no vendor's lien unless there was an express agreement that it should be reserved. This view, we think, is incorrect. "Although sometimes placed upon the the footing of an express agreement or assent, it is now held to be independent of such consideration." 1 Hilliard Real Prop., 674. This court considering the subject of such liens in *Pratt v. Clark*, 57 Mo. 191, said: "The authorities also maintain that this lien or implied trust has 'its foundation in the earliest principles of courts of equity,' and exists entirely independent of any agreement between the contracting parties." As was there further said, the principle on which the lien, which is in the nature of a trust, is founded, is that it would be against conscience to permit a person who has obtained the land of another to keep it and not pay the full consideration money. It was charged in the petition, as we have seen, that it was agreed between Dyer and Bennett that Dyer

was to change the trust deed from one farm to the other and the deeds thereupon exchanged, and that Dyer failed to make such transfer. Without going into details we think the evidence sufficiently shows that this was so, and that the agreement was never complied with. The facts of the case bring it within the control of the principles announced by this court in *Clark v. Pratt*, *supra*, which was again before this court, entitled *Pratt v. Eaton*, 65 Mo. 157. In that case, as in this, there was an exchange of real property and an encumbrance on the piece owned by one of the parties which was agreed to be removed, but the agreement was not complied with and the party to whom it was exchanged was compelled to pay it off. It was held that so much of the consideration had failed and a vendor's lien given for the amount paid to clear the incumbrance. In this case owing to Bennett's want of prudence, it may be, and to Dyer's want of frankness, the possessions were exchanged as we have stated without anything being known by the former or anything said by the latter about the Slatten deed of trust; but before the deeds were fully executed and delivered and the title passed there was a distinct understanding between them, to which it seems that Slatten, the beneficiary in the deed of trust, was willing, that said incumbrance would and should be transferred from one farm to the other. It was never done, and the land Bennett got from Dyer was sold thereunder and went to pay Dyer's debt. Dyer's estate is insolvent and plaintiff has no adequate legal remedy, and his right to his vendor's lien we think clear. The right of the defendant, Mrs. Shipley, formerly Mrs. Dyer, to a homestead in the lands involved was rightfully held by the trial court to be subject to the lien of the plaintiff for the purchase price. The right to dower therein would, also, be subject thereto. R. S., § 2188.

The only remaining matter suggested for our consideration is the quit-claim deed made by Bennett to Slatten for the land traded by dyer. It bears date March

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13, 1875, nearly a year after the sale under the deed of trust. It was taken by Slatten because Mrs. Dyer had not joined in the trust deed, but had joined in the deed to Bennett. Dyer was dead and the consideration therefor, \$500, was paid to get her dower right. This was all that Bennett got by his deed from Dyer. The court reduced the plaintiff's claim on that account, and only decreed a vendor's lien on the land for \$800.

We see no error in this action of the court, and its judgment is affirmed. All concur.

THE STATE TO THE USE OF STEWART, *Appellant*, v. MATLOCK
et al.

1. **Judicial Discretion:** FILING PLEADINGS OUT OF TIME. A trial court does not abuse its judicial discretion in permitting an answer to be filed nine days after the case is set for trial, but before default is entered and upon affidavit showing cause for the delay.
2. **Change of Venue:** PLAINTIFF'S APPLICATION, TIME FOR MAKING. A plaintiff who asks for a change of venue because of the alleged undue influence of the defendant over the mind of the trial judge, must make his application therefor as soon as practicable, after receiving information of the undue influence complained of. Whether the application is so made within proper time, is a question resting in the sound discretion of the trial judge.

Appeal from Randolph Circuit Court.—HON. G. H. BURCKHARTT, Judge.

AFFIRMED.

J. R. Christian for appellant.

The court should not have permitted the defendants to file their answer nine days after the case was set for trial. *Squires v. Bird*, 23 Mo. 472. The court also committed error in refusing to allow the change of venue. *Corpenny*

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v. Sedalia, 57 Mo. 91. The merits on the facts were with the plaintiff.

Kimbrough & Terrill for respondent.

The judgment was not against the evidence, but in accordance with it. The application for the change of venue was properly overruled, as it was made out of time. R. S., § 3731.

MARTIN, C.—This is an action on the bond of a sheriff, which assigns for breach thereof his refusal to offset an execution and fee bill in favor of a defendant against whom he held an execution. It seems that John H. Stewart, for whose use this action is prosecuted, recovered a judgment against one Burton, and that Burton recovered a judgment against said Stewart. It is alleged in the petition that executions were issued upon these opposing judgments, and were placed in the hands of defendant, N. G. Matlock, as sheriff; that instead of offsetting the two demands, he collected the execution against plaintiff by levy and sale, and returned the one against Burton unsatisfied. The material facts of the complaint were put in issue by defendants. The case was tried by the court, without the intervention of a jury, and judgment was rendered in favor of defendants, exempting the sheriff from all liability. From this judgment the plaintiff appeals.

I. It is assigned for error that the court permitted the defendants to file their answer nine days after the case was set for trial. This was done before any default had been entered, and upon a showing of cause for the delay in an affidavit. I can see no abuse of its judicial discretion by the court in accepting the pleading at the time it was filed.

II. It is next urged, that the court erred in refusing a change of venue prayed for by plaintiff. The ground of the application was alleged to be an undue influence of defendants over the mind of the trial judge. In my judg-

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ment, the court committed no reversible error in refusing the application. It was filed on the 28th of July, 1881, in vacation, and states that information of the undue influence had been received by plaintiff at the last term of the court. On the 23rd of August, 1881, the plaintiff served the defendants with a notice that he would, on the first day of the September term, 1881, present his application to the court. This application was not presented to the court on the first day according to notice, but on the second day of the term. If this application had come from the defendant it would have been clearly out of time under section 3731, R. S. 1879, which assumes to prescribe a limit in time beyond which no application can be made. The statutes do not prescribe any fixed limits within which the plaintiff must present his application. But irrespective of any statute, the law requires that his application be made as soon as practicable after receiving information of the undue influence complained of. He cannot be permitted to oust the court of its jurisdiction, after having voluntarily accepted it, after a knowledge of the undue influence. Whether his application has been made as soon as practicable after such information is received, is a question resting in the sound discretion of the court. And I see no error in the court applying to the plaintiff, in this case, the rule of indulgence which the legislature has prescribed for the defendant. If the plaintiff received his information of the undue influence at the last term of the court, he should have presented his application at that term. In the absence of any fact or circumstance going to excuse him from making it then, the court was clearly justified in refusing his prayer made at the next term. An application at a succeeding term of the court becomes necessary in the regular course of business, only when the information was received in vacation. The filing of the application in the clerk's office was no presentation of it, to either the court or the judge in vacation. Notwithstanding the plaintiff's objection to the judge as

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being under the undue influence of defendants, he seems to have waived a jury and accepted him as a trier of the facts of his case.

III. It seems from the record the case was disposed of on an issue of fact, the court finding from the evidence that two executions were not in the hands of the sheriff at the same time. This fact if true, certainly relieved the sheriff from obligation as well as the power to offset one against the other. R. S. 1879, § 3877. The evidence on this issue was conflicting, and it was the province of the trial court to hear it, and decide the issue according to its weight and credibility. It has done this, and its action in that respect is binding upon the appellate court.

No instructions were asked or exceptions saved to the rulings at the trial, and nothing remains for us but to affirm the judgment; and it is so ordered. All concur.

SHEEHAN V. OWEN, *Appellant*.

Special Tax Bills, Action on: ORDINANCES. Where, in all material respects, the ordinances of a city relating to contracts for street improvement, and the issuance of special tax bills for cost of same, are complied with by the city authorities and the contractor, the latter can maintain his action for the amount of such tax bills.

Appeal from Buchanan Circuit Court.—HON. SILAS WOODSON, Special Judge.

AFFIRMED.

Samuel B. Green for appellant.

The petition does not state a cause of action. *Egerman v. Hardy*, 8 Mo. App. 313; *Neehan v. Smith*, 50 Mo. 530; *City, etc., v. Clemens*, 49 Mo. 554; *Weber v. Schergens*, 59 Mo. 393. The notices given by the city engineer did not

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comply with the ordinances of the city, and the contract was thereby vitiated. *Brady v. City*, 20 N. Y. 312; *Riley v. Oppenheimer*, 55 Mo. 375. The publication of the notice did not meet the requirements of the ordinance. The mayor and council did not act concurrently in awarding the contract as they should have done. *Thompson v. City*, 61 Mo. 283; *Saxton v. St. Joseph*, 60 Mo. 158; *Irvin v. Devors*, 65 Mo. 627; *Saxton v. Beach*, 50 Mo. 489; *Graham v. Carondelet*, 33 Mo. 268.

Vinton Pike & B. R. Vineyard for respondent.

To recover for street improvements, under the charter of the city of St. Joseph, the contractor can look alone to the property abutting on the street improved. The charter prohibits the city from becoming liable "in any manner whatever" for work of this character. Acts 1865, p. 435, close of § 5; *Kiley v. City of St. Joseph*, 67 Mo. 491. As the contractor performing the work is absolutely remediless unless he can recover from the property owners, the courts have been inclined to hold, in cases of this character, that only a substantial compliance with the charter and ordinances of the municipality need be observed by the municipal authorities in order to furnish a right of recovery to the contractor. Says the Supreme Court: "We are not inclined to think that the plaintiff need be prepared to prove that all the formalities, which the city ordinances may prescribe, have been observed." *City of St. Joseph v. Anthony*, 30 Mo. 542; *City of St. Louis, etc., v. De Nave*, 44 Mo. 139. Under the charter of the city of St. Joseph, the tax bills make a *prima facie* case. In the language of this court in construing that charter: "The bills make a *prima facie* case of the facts and liabilities stated in them, and present a valid claim until rebutted by countervailing evidence." *Neenan v. Smith*, 60 Mo. 294; *Ess v. Bouton*, 64 Mo. 105; Acts 1865, p. 435, § 5; *City, etc., v. Armstrong*, 38 Mo. 33. The objection to the petition, as presented in the first points

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of defendant's brief, is not well taken. The objection is not well taken that no profile was made by the engineer for the macadamizing, curbing or guttering ordered to be done; the profile was intended to apply to bridges and structures, etc. *Kiley v. Cremor*, 51 Mo. 543; *Sheehan v. Gleason*, 46 Mo. 104, 105. It was not necessary that the mayor should sign the motion or resolution on which the contract was made. *Knight v. Railroad Co.*, 70 Mo. 246.

HENRY, J.—By this suit plaintiff seeks to recover of defendant the amount of two special tax bills, issued by the city of St. Joseph to plaintiff, against two lots of defendant for their proportion of the cost of macadamizing, paving and curbing the street upon which they front, and in his petition the ordinances of the city under which the work was done and all other necessary facts were alleged, unless the following point made by defendant is well taken, viz: that the petition shows a departure from the rule of assessment prescribed by the charter, in that the lots in question were charged with the work done in front of them and not in proportion to the entire cost of the work on the street. The allegation in the petition is that: "By virtue of section 5 of an act entitled an act to amend the charter of the city of St. Joseph, the cost of performing said work adjoining and fronting on the street so improved and by virtue of section 5 of said act the city engineer who had charge of the work when the same was fully completed computed the cost thereof and assessed the same as a special tax against the property upon and adjoining the work done, and also charged each lot of ground in proportion to the frontage thereof with the cost of constructing, reconstructing and repairing the intersections of the next adjoining streets, alleys and other public highways in a manner by said officer deemed equitable." The ordinance requires the cost of the entire work, including cross-walks, etc., at the intersections of adjoining streets and, also, all the work done in front of all the lots to be computed, and

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that against each lot an amount of the cost should be assessed in the proportion its frontage bears to the aggregate frontage of all the lots fronting upon the work.

We think that the allegation in the petition substantially avers that this was done. It is that: "The engineer who had charge of the work when the same was fully completed." What work? Manifestly the entire work upon the street. It could not be said that the work on the street was completed when it was only finished in front of one lot. O'Rourke's contract, assigned to plaintiff, was for the entire work and he was entitled to no compensation until he had completed the work he had undertaken. The answer was a general denial and a special plea of an ordinance of said city passed in June, 1879, which, whenever any public improvements should be ordered by the city, requires the city engineer to advertise for proposals to do the work, first placing upon file, in his office, a plan or profile of the work accompanied by specifications to be open at all reasonable times for public inspection, and that the advertisement for proposals should be inserted in the official paper of the city and continued for at least ten days. The answer further alleged that no plan, or profile, or specifications was ever placed on file in the engineer's office, and that the engineer did not advertise for proposals, as required by the ordinance. That the bids were not opened as required, etc., nor was the contract let to the lowest bidder, nor was plaintiff's assignor the lowest bidder, nor did the mayor and council award the contract to O'Rourke. On the trial plaintiff had judgment, from which defendant has appealed.

It is conceded that no profile or specifications were filed in the engineer's office; but it was proved that it was not customary to make profiles of that kind of work but only of bridges and similar structures, and that the work in this instance was let according to the usual course pursued before and since. We cannot see that a profile of the work in question was necessary to enable one to bid on it.

intelligently. It consisted of macadamizing, paving and guttering. A view of the street upon which the work was to be done, with the ordinance before the bidder, served better than a profile to give an idea of the extent and character of the work. The ordinance ordering the work expressly stated of what materials and the manner in which the work was to be done, and the precise quality of the work upon the street and was as minute and exact in these particulars as could be required in any specifications the engineer might have prepared. We do not think that plaintiff should, as defendant would have him, sustain such a loss for the omission of the city officials to do an act, which, done or omitted, could not materially have affected defendant's interests. The ordinance was published in a daily paper, recorded in the city book of ordinances, and the street upon which the work was to be done was open to inspection and gave those who wished to bid on the work a better idea of the extent and character of the work than any profile could possibly have done, and it is by no means clear that the city officials have not properly construed the ordinance as not requiring the profiles of such work. With respect to the advertisement it was published in the official paper of the city from the 8th to the 20th day of September, 1876, inclusive, every day except Mondays, and it was in accordance with the ordinance pleaded by defendant and must be held sufficient, unless a special ordinance of said city offered in evidence purporting to have been approved, September 14th, 1876, was approved and became a valid ordinance. It recited the steps taken under the ordinance ordering the work in question, and that the parties, whose bid for the work was accepted, had failed and refused to enter into a contract, and provided that the city engineer should re-advertise for proposals for doing said work on Ninth from Powell street to Frederick avenue, except that part, etc. It purports to have been approved by A. Beattie, mayor, September 14, 1876, but Ringo who was city register produced the original ordi-

nance and testified that what purports to be the signature of the mayor, with which he was well acquainted, to the original and the recorded ordinance was neither in the handwriting of A. Beattie, then mayor. It was, therefore, not approved by the mayor and never became an ordinance of said city.

It is, also, contended that the mayor and council did not act concurrently in awarding the contract. The record of the proceedings of the city council shows that on September 22d, 1876, the council met, on the call of the mayor who was present, and that the bids for the work were read and the contract awarded to O'Rourke, as the lowest and best bidder. There is nothing to show that the mayor did not concur in the award, but, on the contrary, the inference from that record is, there being no dissent noted, that all present concurred in the award. There is no requirement that the mayor's assent should be shown by a writing to which his signature is attached. It was not necessary that he, any more than the members of the council, should have signed the record of the award. The concurrence of the council is as necessary as that of the mayor and no higher evidence of the concurrence of the mayor is required than is required to show the concurrence of the council. All that was decided in *Saxton v. Beach*, 50 Mo. 488, is that under an amended charter of the city of St. Joseph, by virtue of which the mayor and councilmen had power to macadamize streets, etc., the work could not be ordered by resolution, but an ordinance was necessary, the mayor's approval of which could only be shown by his signature to the ordinance. The following cases cited by appellant's counsel sustain the ruling in *Saxton v. Beach* but do not support his position in this case; *Thompson v. Boonville*, 61 Mo. 283; *Saxton v. St. Joseph*, 60 Mo. 158; *Graham v. Carondelet*, 33 Mo. 268; *Irvin v. Devors*, 65 Mo. 627.

There was no error in permitting plaintiff to read the ordinances to the jury from the book of ordinances in which they were recorded. The book was kept for the

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purpose of recording ordinances, under an ordinance requiring the city council to record all ordinances passed by the city council, and in *Knight v. Railroad Co.*, 70 Mo. 231, this court held that a certified copy of an ordinance so recorded was admissible to prove the ordinance. Whether O'Rourke was the lowest and best bidder is not an open question. The mayor and council determined that he was, and awarded him the contract which he has complied with. Property-holders cannot lie by and see the work progress to completion without any complaint or effort to stop it, and then defeat the contractor in his suit on tax bills on such a plea as this. The appellant contends that he is charged in the tax bills with the curbing of the street at places where curbing was not ordered by the ordinance, and that in the charge for macadamizing is included "his lot's proportion of the crossing," which is neither included in the ordinance nor the contract. We are unable to see that curbing is charged for in either tax bill not ordered by the ordinance, which ordered the macadamizing, guttering and curbing of Ninth street from Powell street to Frederick avenue. With regard to the crossing the general ordinance required "all crossings at the intersections of streets to be of paving stone, placed even with the surface of the macadamizing." The charge on the tax bill is for "macadamizing 10.12 squares at \$6 per square which includes said lot's proportion of the crossing, \$60.72." The crossing was not macadamized but paved, and the tax bill does not state that it was paved but includes the cost of that work in the \$60.72 charged for macadamizing. Appellant complains that his lot, No. 8, was assessed as of a frontage of seventy-two feet whereas twelve feet of its frontage is taken up by a sidewalk. All lots fronting on Ninth street were charged in the same manner and there was no error in this. Defendant was seized in fee of the entire lot, the public having but an easement over that portion taken up by the sidewalk. Whether the work was all completed before the institution of this suit was a ques-

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tion submitted to the jury by the court in proper instructions and, as there was evidence tending to prove that it was so completed warranting a finding to that effect, we see no reason for disturbing it.

Other errors are complained of by appellant but the length to which this opinion has already extended forbids any further notice of them than to say that they have been considered and were not such as would justify a reversal of the judgment. The work has been done by the plaintiff. No complaint is made that it was not done according to the contract, or that plaintiff is in any manner charged with notice of alleged irregularities in the proceedings of the council or the acts of the city officials, and while there may have been some irregularities, the ordinances were substantially complied with by the city authorities and nothing done or omitted which could possibly have affected injuriously the interests of the defendant or other property-holders, and we are not inclined to turn a plaintiff out of court who has given his time and expended his money in the improvement of their property on mere technicalities which in no manner affect the substantial rights or interests of the parties. If, in any material respect, the ordinances of the city bearing upon the questions involved had been disregarded by the city authorities or the plaintiff, his suit on his tax bill could not be maintained, but discovering no such disregard of the ordinances or any material error committed in the progress of the trial in the court below the judgment is affirmed. All concur.

Kirkland v. The Missouri Pacific Railway Company.

KIRKLAND V. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Railroads: FENCE: DOUBLE DAMAGES. A railroad is not excused from fencing under the double damage act where its right of way merely abuts upon a town plat, and it does not appear that any streets or alleys of the town abut upon or cross such right of way.

Appeal from Monroe Circuit Court.—HON. THEODORE BRACE, Judge.

AFFIRMED.

Smith & Krauthoff with *T. J. Portis* for appellant.

The court erred in refusing the instruction asked by the defendant. The point at which the hogs sued for entered upon the defendant's railroad was not one at which the defendant was required to, and could not lawfully, construct a fence under section 809, Revised Statutes, being within the limits of the town plat of the town of Stoutsville. The action should have been brought under section 2124, Revised Statutes. *Elliott v. Railroad Co.*, 66 Mo. 683; *Edwards v. Railroad Co.*, 66 Mo. 567; *Farrell v. Union Trust Co.*, 77 Mo. 475, 476, 477. And having sued under section 809, the plaintiff must recover, if at all, under that section. *Edwards v. Railroad Co.*, 66 Mo. 567, 569, and cases cited; *Luckie v. Railroad Co.*, 67 Mo. 245.

A. M. Alexander for respondent.

The point at which the hogs sued for entered upon the defendant's railroad and were killed, was not within the limits of the town of Stoutsville, and was a place at which the railway company was bound by law to fence. The road-way at the point named abuts upon the platted town of Stoutsville—that is the north line of the right of way is the south line of the platted town. The evidence shows that at the point where the hogs were killed the railroad is not in the limits of the town of Stoutsville at all, but

simply that the right of way touches the town of Stoutsville. "Abuts upon" does not mean "inside of," in ordinary use; it means touching, and that is the meaning of the word as used in the record. See Webster's Dictionary.

NORTON, J.—This was an action to recover double damages for the alleged killing of seven hogs belonging to plaintiff. Upon a trial in the circuit court, the plaintiff testified in his own behalf, "that he was the owner of the hogs sued for, and they were of the value of \$3 each, and that one of them got on the defendant's railroad and was killed east of the public road which comes into Stoutsville from the east, and that one of them was killed just south of his shop and west of the last mentioned public road, and the others just west of the last mentioned place on defendant's road, and that there was no fence along the side of defendant's road at that point; and that defendant's road-way abuts upon the platted town of Stoutsville, where the last named six hogs were killed. That all of said hogs were killed in Jefferson township, Monroe county, Missouri." This being all the evidence, the defendant asked the following instruction: "That plaintiff is not entitled to recover in this action for any of the hogs that were killed on that part of defendant's road which abuts upon the platted portion of the town of Stoutsville." This instruction was refused, to which the defendant excepted, and thereupon the court found for the plaintiff, and upon his motion, rendered judgment for double damages. The defendant unsuccessfully moved for a new trial, excepted to the action of the court in overruling it, filed its bill of exceptions, and brings the case here by appeal.

It does not appear that defendant's road passes through the town of Stoutsville, but, on the contrary, it does appear from the plat referred to in the bill of exceptions, that the entire road-bed as well as right of way on either side is entirely outside the limits of the town. Neither does it appear that there were any streets or alleys in the town of

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Stoutsville either across or abutting on defendant's right of way, the northern line of which abutted on the southern line of the town. On this state of facts we must hold, under the ruling of this court in the case of *Wymore v. Railroad Co.*, 79 Mo. 247, that the court did not err in refusing the instruction asked.

Judgment affirmed, in which all concur.

MOORE V. RINGO, *Appellant*.

1. **Contract:** CONSIDERATION, PROOF OF DIFFERENT ONE. Where an executory contract recites a consideration which is shown to be nominal or unreal, the real consideration can be shown for the purpose of supporting the contract.
2. **ChamPERTY:** PLEADING. The defense of champerty must be specially pleaded.
3. **Contract:** CHAMPERTY. A contract to defray half the expenses of litigation necessary to set aside a deed as fraudulent, and to share in the proceeds of such litigation, is champertous; but a contract is not champertous which provides that one party is to buy the land and convey one-half interest therein to the other, and the latter is then to bring suit for it and pay half the costs of the litigation.

Appeal from Scott Circuit Court. — HON. J. D. FOSTER,
Judge.

AFFIRMED.

D. H. McIntyre and F. M. Brown for appellant.

The consideration set forth in the written contract having failed, respondent was precluded from showing any other, there being no words in the contract indicating any other consideration. 1 Parsons on Cont., (6 Ed.) top p. 429; *Emery v. Chase*, 5 Greenlf. (Me.) 232; *Howes v. Barker*, 3 John. (N. Y.) 506; *Schmerhorn v. Vanderheyden*, 1 John. (N. Y.) 138; *Veacock v. McCall*, Gilpin (U. S.) 329;

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Cutter v. Reynolds, 8 B. Mon. (Ky.) 596; *Mitchell v. Williamson*, 6 Md. 210; *Winchell v. Latham*, 6 Cow. 682. The consideration named in the contract having failed, the contract possessed no binding force, and was not obligatory upon appellant. 1 Parsons on Cont., (6 Ed.) top p. 461; 2 Wharton on Cont., § 742, p. 118; *Williams v. Mellon*, 56 Mo. 262. But even if respondent could properly be allowed to give oral testimony to show a consideration different from that set out in the contract, the testimony so given establishes the fact that the contract was a champertous contract, and therefore void. *Duke v. Harper*, 66 Mo. 51; 2 Parsons on Cont., (6 Ed.) pp. 765, 766. A contract between attorney and client that the former shall prosecute a suit at his own expense for a certain part of the subject in litigation, is champertous and void. 1 Story on Cont., (5 Ed.) § 713, p. 690; *Martin v. Clarke*, 8 R. I. 389; *Weakly v. Hall*, 13 Ohio 167; *Rust v. Larue*, 14 Am. Dec. 172. If the consideration of any contract, either in whole or in part, be illegal, this defeats the entire contract, and it is wholly immaterial whether the contract discloses such illegality, or it be established by evidence *aliunde*; the principal is the same in either event. *Sumner v. Summers*, 54 Mo. 340. Plaintiff was defendant's attorney and this court will scrutinize closely this entire transaction. The refusal of the court to hear appellant's counsel argue the case upon its merits, was such a gross abuse of its power as to demand a reversal of the judgment. Const., art. 2, § 10; Proffat on Jury Trials, § 243; *Burson v. Mahoney*, 6 Baxter (Tenn.) 397; *Legg v. Drake*, 1 Ohio St. 286; *Dobbins v. Oswait*, 20 Ark. 619; Hilliard on New Trials, § 40; Graham & Waterman on New Trials, p. 682; *State v. Hoffman*, 78 Mo. 256.

Thoroughman & Valliant for respondent.

Where a jury is waived and the cause is tried by the court, it is unusual for a court to hear argument, except on a motion for a new trial. Verbal testimony is admissible

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to show a different consideration from that expressed in the deed. *Miller v. McCoy*, 50 Mo. 214; *Fountain v. Boatman's Savings B'k*, 57 Mo. 552; *Hollocher v. Hollocher*, 62 Mo. 267; *McConnell v. Brayner*, 63 Mo. 461. The contract was not champertous. *Duke v. Harper*, 66 Mo. 51. The defense of champerty should have been specially pleaded. *Dickson v. Burk*, 6 Ark. 412; *Suit v. Woodhall*, 116 Mass. 546; *Cummins v. Barkalow*, 1 Abb. Ct. App. 479; *s. c.*, 4 Keyes (N. Y.) Ct. App. 514; *Chambers v. Green*, 2 G. Green (Iowa) 320.

HOUGH, C. J.—On the 9th day of April, 1869, the plaintiff, as attorney, obtained a judgment for the defendant against Hartwell Brock and Levi S. Green for the sum of \$456.10. The plaintiff was employed simply to obtain judgment, Brock and Green being regarded as insolvent at the time. No effort was made to enforce this judgment by execution, until 1871, when the plaintiff suggested to the defendant that he thought the amount of his judgment could be made out of certain land which he believed had been fraudulently conveyed by Brock and Green. Thereupon an agreement was entered into between the plaintiff and the defendant that said land should be sold under execution to be issued on the judgment aforesaid, and purchased by the defendant, and divided between the plaintiff and defendant. The terms and conditions upon which the land was to be divided are differently stated by the plaintiff and the defendant, and the difference between them in this regard is the occasion of the present controversy. On the 21st of October, 1871, the land was purchased at execution sale as agreed, and on the 26th day of October, 1871, the defendant signed an instrument in writing whereby he promised in the consideration of the sum of \$1 to convey by quit-claim to the plaintiff upon demand an undivided half of the property so purchased. On the 22nd of March, 1872, the defendant conveyed said property to one Allen, for the sum of \$484, and this suit was brought by the plaintiff.

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iff to recover one-half of the sum so received by the defendant. The defendant set up in his answer:

That the plaintiff had never paid the \$1 consideration named in the contract, and that the said contract was without any consideration whatever.

And further that plaintiff was his attorney and procured the judgment against Brock and Green for him, and that he paid plaintiff for all his services in that behalf. That plaintiff advised him to bid in said land at the execution sale. That he was to pay plaintiff one-half of what would be made out of said sale over and above his debt and costs. That plaintiff was to pay half the costs of such sale if it should be made. That after said sale plaintiff brought the instrument sued on to defendant and falsely represented it to be the contract named above. That he believed plaintiff, his then attorney, and did sign said contract. That said land was of less value than his debt and costs, and that the sale to Allen was for less than his debt and costs. Wherefore he prayed judgment.

These allegations were denied by the plaintiff. The trial was by the court without the aid of a jury, and no instructions were asked or given for either party. The court rendered judgment for the plaintiff for \$253.45.

On this state of the record we have only to inquire whether there is any testimony which will support the finding and judgment of the court. The defendant testified substantially as follows: Plaintiff was my attorney in suit against Brock and Green. I paid him for all services in that case and have his receipt. I signed the contract sued on. Plaintiff never paid me a dollar on the contract. Never did anything for me as a consideration. He suggested to me to go into partnership with him in the land. I understood he was to pay half the expense of suit, and be an equal partner with me in all that might be realized from sale of land in excess of my debt. This was my understanding of contract when he brought it to me and I

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signed it. All that I realized, from sale to Allen was amount of my judgment, interest and cost of suit.

The plaintiff testified substantially as follow: I got a judgment for defendant against Brock and Green; he paid me for it; did not receipt him for all he owed me on other business; long after he had paid me for getting the judgment, I believed I saw opportunity for him to make his money out of some land that had been fraudulently sold by his defendants and told him so, and told him to have land sold under execution and buy it, and I thought I would have fraudulent deed set aside; defendant said he would go to no more costs about it unless I would go in with him and buy land and pay half cost of suit; I told him he would have to buy it, and if he would, I would order execution and have land sold, and he would convey me half interest in land, and I would pay half of cost of suit to set aside sale of land and bring suit; he said it was fair; to go on, he would do as I suggested; I ordered execution and he bought the land under my direction for \$21, and sheriff's deed was made to him; five or six days after, defendant and I agreed I should fix up writing showing he was to convey me an undivided half of land; I did so and gave him and he read it and said he thought it was all right, and put it in his pocket and said he would look over it and sign it and give it back to me; eight or ten days after, he gave it to me with his signature, and said something to the effect that I should act on it as I thought best; I was astonished soon after to find he had conveyed all of land in question to Benj. F. Allen, without saying anything to me about it; first I knew of sale I saw deed on record; am informed defendant got \$484 for land; some time after sale I spoke to defendant about it and he said I had not paid the \$1 consideration nor any cost, and he did not think I would claim anything, and also said he thought I was only to have half after his debt was paid, and that he would see his lawyer; I let him have writing to show his lawyer, and afterwards spoke to him about it

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and he said his lawyer told him not pay me a cent; I think I paid him well for half interest; *he would not have made a cent out of the judgment if I had not pressed him to have the land sold and buy it in and undertaken with him to pay half the cost*; my advice and services in the execution, hunting up title to land, making out a case I could rely on in setting aside the sale, were well worth half the sum he sold the land for; I would not have gotten a cent except as it should be realized out of this land, for Brock and Green were both insolvent and are yet; Brock is dead; no mention was made of my taking half after judgment was paid; never thought of such a thing; land was worth \$1,100.

It will be seen that the plaintiff's testimony contains statements amply sufficient to support the judgment of the circuit court, and it is to be presumed that it was upon this testimony its judgment was based. It is urged in this court, however, that as the consideration expressed in the written contract was not the real consideration and has also failed, that the plaintiff is precluded from showing any other, there being no words in the contract indicating that there was any other consideration, and that the contract was, therefore, not binding upon the defendant, and the court erred in enforcing the same. There are authorities supporting this position, but the better rule seems to be that, where a consideration has been inserted in an executory contract which is shown to be nominal or unreal, the real consideration may be shown for the purpose of supporting the contract. Bishop on Con. § 65 and cas. cit.; 1 Parsons Con. (6th Ed.) 429, note k.

It is also contended in this court that the contract between the plaintiff and the defendant was champertous. It would be a sufficient answer to this contention of the defendant to say that no such defense was set forth in the answer. A general plea of want of consideration or failure of consideration has always been admissible, but where the defense is that the real consideration is an illegal one, the facts constituting the illegality must be set forth. *Suit v.*

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Woodhall, 116 Mass. 547; *Dickson v. Burk*, 6 Ark. 412. The facts set forth in the answer do not constitute the contract a champertous one. The costs there referred to are plainly the costs of making the sale under execution. But as we look at that portion of the testimony of the plaintiff and defendant, which would have been admissible in support of a plea of champerty, if such plea had been made, in the absence of any declarations of law, the judgment of the court would have to be upheld. The testimony of the defendant tends to show, indeed, that the contract was a champertous one, as according to his version of the agreement, the plaintiff was to defray half the expenses of the litigation necessary to set aside the deed of Brock and Green as fraudulent, and to share in the proceeds of the litigation after satisfying the defendant's judgment. The testimony of the plaintiff on the contrary, which it is to be presumed the court accepted as true, if it considered this question, is that the defendant was to buy the land and convey a half interest therein to the plaintiff, and plaintiff was then to bring suit and pay half the costs of the litigation. Such a contract has no taint of champerty about it. Having a half interest in the land it would have been right and proper that the plaintiff should contribute half of the costs of suit.

Complaint is also made, that the court would not permit the defendant's counsel to argue the case and read the law to the court, and an exception was saved to the refusal of the court to permit the defendant to read the law, but no exception was saved to the refusal of the court to hear argument on the facts. As the finding is for the plaintiff and the law will support such finding, there is no ground for reversal in this exception. If the defendant's counsel desired to preserve any question of law for this court he should have presented declarations of law to the trial court.

The judgment of the circuit court will be affirmed. The other judges concur.

The Young Men's Christian Association of Kansas City v. Dubach.

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF KANSAS CITY
v. DUBACH *et al.*, Appellants.

1. **Specific Performance: LAND: PLEADING.** In an action for the specific performance of a contract to sell land, plaintiff need not allege the contract is in writing.
2. **Practice: INSTRUMENT SUED ON: STATUTE.** The statute, (R. S., § 3560,) requiring the instrument of writing sued on to be filed with the petition, unless it is lost or destroyed, does not apply to such action.
3. ———: **LEGAL CAPACITY TO SUE: CORPORATION.** The question of the legal capacity of plaintiff to sue as a corporation, must be raised by demurrer or answer, or it is waived.
4. ———: ———: **POWER TO HOLD LAND: DEFENSE.** The incapacity of a corporation, in a suit by it for the specific performance of a contract to sell land, to purchase and hold the same is a matter of defense.
5. **Land, Contract for Sale of.** A contract in writing for the sale of land, need not all be contained in one instrument signed by the vendor.

Appeal from Jackson Circuit Court.—HON. TURNER A. GILL,
Judge.

AFFIRMED.

Tomlinson & Ross and J. T. Dew for appellants.

The motion to dismiss should have been sustained. *Wildbahn v. Robidoux*, 11 Mo. 659; and the motion was the proper way to raise the point. *Hann. v. St. J. R. B. Co. v. Kundson*, 62 Mo. 569; *Peake v. Bell*, 65 Mo. 584. The objection to all the evidence, because the petition does not state facts sufficient to constitute a cause of action, should have been sustained. *Pershing v. Canfield*, 70 Mo. 140. The objection to the record offered by plaintiff to prove its corporate capacity, ought to have been sustained, and plaintiff should have been required to prove its incorporation by competent evidence. R. S., § 710; Bliss on Code Plead., §§ 246, 251, 324, 345; Gould on Plead, chap. 6, § 47, note

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6; *Farmers & Drovers' Bank v. Williamson*, 61 Mo. 259; *Little v. Harrington*, 71 Mo. 390. When an alleged agreement to convey land is denied in defendant's answer, it is not necessary for him to insist upon the statute of frauds as a bar, but the plaintiff must produce legal evidence of the existence of the agreement which cannot be established by parol proof. Bliss on Code Plead., § 353, and cases there quoted; *Wildbahn v. Robidoux*, 11 Mo. 659; *Cozine v. Graham*, 2 Paige 177, 181; *Ontario Bank v. Root*, 3 Paige 478, 481. Bryan was acting under special written authority, as plaintiff's representatives knew. If he exceeded his authority, the defendants are not bound. Story on Agency, §§ 69, 72, and note; *Tate v. Evans*, 7 Mo. 419; *Mechanics Bank v. Schaumberg*, 38 Mo. 228, 238; *Nesbitt v. Helser*, 49 Mo. 383. One relying on the ratification by the principal of an agent's act, must show that the confirmatory act took place with full knowledge of all the facts by the party to be charged. *Cravens v. Gillihan*, 63 Mo. 28; *Bank v. Gay*, 63 Mo. 33; *Arnold v. Dresser*, 8 Allen 435. Acceptance of an offer to sell land, to be operative, must be unequivocal, unconditional and must not vary from the proposal. Fry on Spec. Perf., §§ 167 to 172; Waterman on Spec. Perf., §§ 132, 134, 135; *Eads v. Carondelet*, 42 Mo. 113, 117; *Carter v. Shorter*, 57 Ala. 253, 257, 258; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20. In a suit for specific performance, the contract, as alleged in the petition, must be clearly shown to have been fully agreed upon by both parties to the suit in all particulars, and closed, and the parties must have agreed to the same thing, in the same sense. Waterman on Spec. Perf., §§ 141, 152; *Taylor v. Williams*, 45 Mo. 80; *Blanchard v. Railroad Co.*, 31 Mich. 43. Contracts to be specifically enforced, must not only be proved in a general way, but their terms must be so precise and exact that neither party could reasonably misunderstand them, and those terms must be satisfactorily established by the evidence. *Taylor v. Williams*, 45 Mo. 80, 84; *Underwood v. Underwood*, 48 Mo. 527. And the execution of an undelivered

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deed is not evidence of a contract to convey. *Freeland v. Charnley*, 80 Ind. 132; *Pulse v. Miller*, 81 Ind. 190. Such contracts must be fair and honest, and not the result of a mistake of intention. *Brix v. Ott*, 101 Ill. 70; *Pulse v. Miller*, 81 Ind. 190. They must describe the land with certainty. *Johnson v. Craig*, 21 Ark. 533; *Campbell v. Johnson*, 44 Mo. 247; *Alexander v. Hickox*, 34 Mo. 496; *Holme v. Strautman*, 35 Mo. 293, 302, 303; *Vasquez v. Richardson*, 19 Mo. 96, 98. If a contract be not mutual and binding on both parties to it at the time of its formation, it cannot be specifically enforced at the request of either, and it is immaterial whether the lack of mutuality results from personal incapacity, nature of the contract or any other cause. *Mastin v. Halley*, 61 Mo. 196; *Duwall v. Myers*, 2 Md. Ch. 401; *Sturgis v. Galindo*, 59 Cal. 28. A party cannot state one cause of action in his pleading and recover on a different one. *Waldhier v. Railroad Co.*, 71 Mo. 514; *State v. Creusbauer*, 68 Mo. 254; *Dorman v. Intelligencer Co.*, 70 Mo. 168. This is applicable in equity suits, as well as to actions at law. *Newhaver v. Kenton*, 79 Mo. 382; *Hitch v. Davis*, 3 Md. Ch. 266. Dubach & Co. having expressly repudiated the pretended contract, it was the duty of plaintiff to have proceeded at once to enforce the rights they claimed. *Waterman on Spec. Perf.*, §§ 469, 470, *et seq*; *Fry on Spec. Perf.*, § 732; *Banks v. Burnam*, 61 Mo. 76.

Peak, Yeager & Ball and *W. J. Scott* for respondent.

The petition substantially alleges all the facts necessary for a recovery. It was not necessary for the plaintiffs to plead a written contract, one good at common is all that is required, and if the adverse party wish to set up the statute of frauds he must plead it or waive it. The defendants by their pleading waived the statute of frauds. *Gist v. Eubank*, 29 Mo. 248; *Gardner v. Armstrong*, 31 Mo. 535; *Sherwood v. Saxton*, 63 Mo. 78. The petition alleges that plaintiff had ever been ready and willing to perform its

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part of the contract, and he offered to bring the amount due into court. This was a sufficient tender. *Brock v. Hidy*, 13 Ohio St. 306; *Diechman v. Diechman*, 49 Mo. 109. It is only necessary to describe the land with reasonable certainty. *Johnson v. Craig*, 21 Ark. 533; *Briggs v. Munchon*, 56 Mo. 467. The plaintiff has not been guilty of laches. *Landrum v. Union B'k*, 63 Mo. 48; *Bridshaw v. Yates*, 67 Mo. 221. The defendants having contracted with respondent in its corporate capacity were estopped from denying its corporate existence. By their plea of the general issue, the defendants admitted the corporate existence of respondent. *Nat. Ins. Co. v. Bowman*, 60 Mo. 252; *Farmers' Ins. Co. v. Needles*, 52 Mo. 17; *Farmers' etc. B'k v. Williamson*, 61 Mo. 259; *Brown v. Ilins*, 27 Conn. 90. The memorandum required by the statute may consist of a single writing signed by the party or his agent, or it may be found in various writings or in letters. *Moore v. Mountcastle*, 61 Mo. 424; *Catheart v. Robinson*, 5 Pet. 264; *Huddleston v. Briscoe*, 11 Ves. 591. The decree was for the right party.

HENRY, J.—This is a suit wherein plaintiff asks that defendants be compelled specifically to perform a contract for the sale and conveyance of lot 55, Swope's addition, being the property situated on the northeast corner of Tenth and Walnut streets in Kansas City, Missouri, known as "the Cooley lot."

The petition alleges that plaintiff is a corporation, etc., and that defendants, on the 30th of November, 1878, owned the lot above described. That on or about that day, plaintiff and defendants entered into an agreement by which plaintiff agreed to buy, and defendants to sell, said lot for \$1,100, with condition, on defendants' part, that they should make a perfect title, and on plaintiff's part, to pay \$25 as a preliminary deposit on account of purchase, and the balance upon delivery by defendants to plaintiff of a deed to said property, provided the title should be satis-

factory to plaintiff. It alleges payment of said \$25 as a preliminary deposit, and that said title was found satisfactory to plaintiff, and that afterwards, on or about the 15th day of January, 1879, defendants sold and plaintiff purchased said property, and have since demanded a deed which defendants refused to deliver. That plaintiff has ever been ready and willing to perform its part of said contract, and does hereby offer and agree to bring said balance, \$1,075, into court to be paid to defendants, upon delivery to plaintiff of a satisfactory deed to said property.

The answer admits that on or about the 15th day of January, 1879, about one year before this suit was commenced, plaintiff demanded a deed of defendants, as alleged in the petition, and that defendants refused to execute it, and repudiated the pretended agreement sued on, as alleged by plaintiff, and denied every other material allegation in the petition.

On a hearing of the cause at the October term of the Jackson circuit court, a decree was rendered in plaintiff's favor from which this appeal is taken.

Appellants' first contention is that the suit should have been dismissed on their motion, because the petition was founded upon an instrument in writing charged to have been executed by defendants, which was not filed with the petition and not alleged to have been lost or destroyed. Section 3560, relied upon by appellants' counsel, has no application to this case. A written agreement is not alleged, nor was it necessary to allege that the agreement to sell was in writing. *Gist v. Eubank*, 29 Mo. 248; *Gardner v. Armstrong*, 31 Mo. 535; *Sherwood v. Saxton*, 63 Mo. 78. The statute applies to actions grounded upon instruments in writing which are declared upon, as such, and was not intended to abolish the rule of pleading which authorizes a plaintiff to declare upon a contract which, at common law, was valid though resting in parol, notwithstanding a statute subsequently requires such contract to be in writing.

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Nor was it incumbent on plaintiff to prove its incorporation. The cases cited by appellants' counsel are authorities against their position. In *Farmers and Drovers' Bank v. Williamson*, 61 Mo. 259, plaintiff sued and obtained a judgment in a justice's court, from which an appeal was taken to the circuit court, and, in delivering the opinion of this court, to which an appeal was taken, Sherwood, J., said: "Even, however, did the record disclose this fact (that plaintiff is a corporation) it is not seen how this would help the defendants' case, for in trials before a justice of the peace, in the absence of anything to the contrary, the defendant is presumed to plead the general issue. This plea, as a matter of course, goes to the merits and admits the corporate capacity of the plaintiff and the ability to sue; and it would seem but reasonable that a corporation should occupy the same footing, in this regard, as a material person." The case of *Little v. Harrington*, 71 Mo. 390, so far from supporting the position contended for by appellants' counsel, is, also, an authority against them. It was there expressly held that, while the statute contemplates but one answer, it may contain whatever defense or defenses the defendant may have, "thus dispensing with the common law rule that a plea in bar waives dilatory pleas, or pleas not going to the merits." But sections 3515 and 3519 are clear and explicit on the subject. Section 3515 provides that "The defendant may demurr to the petition when it shall appear upon the face thereof * * * second, that plaintiff has not legal capacity to sue." And section 3519 declares that:

"When any of the matters enumerated in section 3515 do not appear upon the face of the petition, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, then defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject matter of the action, and excepting the objection that the

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petition does not state facts sufficient to constitute a cause of action."

Judge Bliss, in his Code Pleading, says: "Although the plaintiff, if an artificial person, whose existence is not presumed, may be required to show such existence on paper, that the fact may be put in issue, yet the failure to do so is not a failure in stating the cause of action. It is but reasonable then, that the statute should require the defendant, if he objects to the plaintiff's demand, because where it is not presumed, he does not show a right to appear in court, to base his objection specifically upon that ground; I know of no comprehensive phrase that so well describes the ground of objection as a want of legal capacity to sue." Bliss on Code Pleading, sec. 408. To the same effect is *Bulkley v. The Big Muddy Iron Co.*, 77 Mo. 103.

It is, also, contended, that conceding the incorporation of plaintiff it had no capacity to enter into a contract for the purchase of land. Section 706, R. S., declares that "every corporation, as such, has power * * * ; fourth, to hold, purchase, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter, or the law creating it." The power to hold includes the power to acquire by purchase. Whether the amount of land this plaintiff may acquire was specified and limited in its articles of association is not a matter of inquiry, inasmuch as its capacity to purchase and hold the lot in question was not put in issue; and we may, therefore, assume, that having the right, under the general law, to acquire land, its articles of association provided for such acquisition.

The controlling questions in the case are: 1st, Was Bryan defendants' agent to sell the lot? 2d, Did he, as such, sell the lot to plaintiff? and, 3d, Was the contract reduced to writing and signed by defendants? There can be no question on the testimony that Bryan was defendants' agent to sell the property, but he was not a general,

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but only a special agent. The proposition made by plaintiff to purchase, was not accepted by Bryan when made, but he told plaintiff he would submit the proposition to defendants and that he always wrote defendants about any offer he got for any of their property. Plaintiff was thus notified that Bryan was not and did not assume to act as a general agent for the sale of this property. In his letter to defendants, dated December 2, 1878, Bryan informed defendants of plaintiff's offer of \$1,100, defendants to pay all taxes for that year and for a sidewalk the city was putting down, and to furnish abstract of title. Defendants' reply was first by telegram rejecting the proposition. It was as follows: "You can sell the Cooley lot for \$1,100 cash, purchaser to pay the grading tax, we to pay general taxes." On the same day, they wrote substantially to the same effect, closing with the following: "These are our terms, and if they want it all right; if not we shall take the chances on it as we think real estate in Kansas City has seen its worst." Up to this date no agreement was concluded between the parties. Prior to December 3d, 1878, on the 27th of November, 1878, Doan and Furguson, building committee of plaintiff, gave to Bryan & Browne the following order:

"J. W. Byers, treasurer of the Young Men's Christian Association, will pay to Bryan & Browne, agents, \$25 as preliminary deposit on account of lot of ground (describing lot in question) to which property it is hereby agreed that a perfect and satisfactory title shall be made upon final payment, including this, of the total sum of \$1,100.

"CHAS. H. DOAN,

"F. M. FURGUSON."

On which Bryan & Brown wrote the following receipt:

"Received payment of within amount, with agreement to refund same if property is not conveyed as indicated.

"BRYAN & BROWNE."

On the day that the order and receipt were interchanged, Bryan informed plaintiff that he would submit its

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proposition to defendants and, it is clear, taking this fact in connection with the peculiar character of the receipt for the \$25, that neither plaintiff nor Bryan intended those papers to conclude a contract of sale, and if this and the letters and telegram above mentioned had been the end of the negotiations there could be no pretense that a contract of sale had been made; but on the 10th of January, 1879, Bryan wrote to Dubach & Co., stating that: "The parties to whom I sold the Cooley lot handed me the deed on the 6th and then came afterwards and would not let me send it, while they were quibbling about the grading and sidewalk tax on it, which they agreed to pay at first and to-day have consented all right. They have drawn up a little contract to go with the deed which I told them you would not sign. I told them we would get a quit-claim deed for them if it could be done." The contract sent with the deed for Dubach to sign related to the sidewalk, and required Dubach to pay all that it should cost exceeding \$50. The plaintiff subsequently waived it, and would necessarily have that tax to pay when they become owners of the lot, it being a lien on the lot, and in the decree the court charged plaintiff with that and other taxes paid by defendant since the contract of sale was entered into. To this defendants replied January 14, 1879, as follows:

"We will sign the deed as sent and will agree to pay any small expense to get a quit-claim from Keiser. * * Our warranty is good, and we do not propose to spend much money, or to allow others to do it for us to correct a slight defect that amounts to nothing. If this is satisfactory we will send the deed properly executed." In the same letter they corrected Bryan's overcharge of commission on the sale of the lot.

To that letter Bryan replied on the 18th of January, 1879, stating that the plaintiff accepted the proposition contained in defendants' letter of January 14th.

Subsequently defendants signed and acknowledged the deed, with the intention of sending it to Kansas City for

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plaintiff, but were informed by Mr. Ross, by telegram, that the United States custom house was located on the block, and David Dubach then said to his brother and co-defendant: "That settles it; we won't sell." On the 30th of January, 1879, they wrote to Bryan, saying: "We do not expect to execute the deed to the Cooley lot. They waited too long for the cat to jump, and, thanks to our friends, they apprised us of the jumping of the cat before it was too late." Why did they not send the deed? Was it because there was no valid contract of sale? They do not say so, but it is manifest that they were ready and willing to send, and would have sent it, but for information of the enhanced value of the property owing to the location of the custom house on the same block. They gave no other reason for not completing the sale by delivery of the deed, except information received by them of the good fortune of owners of lots in that block. From these letters and telegram no difficulty is encountered in finding all the terms of the contract between the parties. They were all reduced to writing, although not contained in one instrument and signed by the defendants.

No error materially affecting the merits of this controversy occurred on the trial of the cause, and we are all of opinion that the judgment should be and it is, therefore, affirmed.

THE STATE *ex rel.* PATTERSON V. MARSHALL *et al.*, Appellants.

1. **Coroner's Fees: MANDAMUS.** The allowance of fees to a coroner for an inquest on a dead body, is, under Revised Statutes, section 5157, subject to the judicial discretion of the county court, and cannot be controlled by a writ of mandamus.
2. **Mandamus.** Mandamus does not lie where a remedy by appeal exists.

Appeal from Mississippi Circuit Court.—HON. J. D. FOSTER,
Judge.

REVERSED.

J. J. Russell for appellants.

(1) The writ of mandamus did not lie in this case, because it was an ordinary claim for which no judgment had been rendered and for which if petitioner had a right, he had other legal and adequate remedies. When the county court refused to pay, an appeal was the proper remedy. R. S. §§ 1210, 1216; *Mansfield v. Fuller*, 50 Mo. 338; *Ward v. County Court*, 50 Mo. 401. (2) A county court cannot be compelled by mandamus to make an order which involves, and can only be the result of judicial discretion. *Strahan v. Audrain County Court*, 65 Mo. 644. The statute expressly imposes upon the county courts the exercise of certain judicial functions in paying inquest fees, and after they have done their judicial work, they cannot be compelled by mandamus to review it. R. S. §§ 5157, 5158. The writ might be used for the purpose of compelling a county court to proceed to a judicial duty, but not to dictate what its judgment should be. *Milttenberger v. St. Louis County Court*, 50 Mo. 172; *State ex rel. Metcalf v. Garesche*, 65 Mo. 480. In this case the county court had acted and used their judgment and discretion, and this writ cannot be resorted to for the purpose of correcting any error they might have made. *State ex rel. School District v. Byers*, 67 Mo. 707; *State ex rel. v. St. Louis Cir. Ct.*, 1 Mo. App. 543. (3) The mandatory clause of the writ should expressly and clearly state the precise thing that is required. *State ex rel. Jeffries v. Trustees of the Town of Pacific*, 61 Mo. 155; *State ex rel. McGrath v. Holladay*, 65 Mo. 76. The statute has been changed since the decision in *Boisliniere v. Board of County Commissioners*, 32 Mo. 375.

Smith & Krauthoff and *R. A. Hatcher*, for respondent.

There is nothing in the statute to warrant the county court to revise the action of the coroner or that gives it a discretion in respect to his fees. The coroner is only to present to the court a certified statement of the costs and expenses of the inquest including his own fees, etc., and it is the duty of the county court to allow the same. The county court passes upon the account for no other purpose than to determine whether the specific charges therein are in conformity to the statute and for no other purpose, and this is not disputed in this case. The county court cannot call in question the judicial discretion of the coroner. *Boisliniere v. Board of County Commissioners*, 32 Mo. 375. Nor has the statute been changed since the decision in the case just cited as contended by appellants. The writ of mandamus was properly resorted to in this case.

EWING, C.—The plaintiff as coroner of Mississippi county, filed his petition for a mandamus to compel the defendants as justices of the county court of Mississippi county to “audit and allow the statement of fees” certified to them by the said coroner.

The petition alleges that on November 7th, 1881, the body of an unknown dead man was found in his county. He issued his warrants. A jury was summoned, and an inquest held. A verdict returned and the fees and expenses certified to the county court. That there being no relative or friend of the deceased, nor any person willing to bury the body, nor any person whose duty it was to attend to such burial, petitioner caused the same to be buried. That the county court “refused either to audit or allow the statement of costs or expenses or any part thereof.”

The respondents, in their return to the alternative writ, admitted that the petitioner was coroner, that a man had died, that the inquest was held and the body buried. But

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allege "that it did not appear to the court that the coroner either before or during the inquest, had reasonable cause to believe that such body was that of a person who had come to his death by violence or casualty, or that he was unknown and found dead in said county, but that it did appear to said court that said deceased person was well known * * and that there was no reason for believing that he came to his death by violence or casualty, and that, therefore, the county court, * * in the exercise of its legal and judicial discretion, did refuse to pay or draw warrants for fees claimed by petitioner."

The circuit court, on trial awarded a peremptory writ, from which the defendants appealed to this court.

I. Section 5136, Revised Statutes 1879, directs when coroners shall hold an inquest over a dead body. Section 5150 directs under what circumstances he shall bury the body. Section 5156 provides that the coroner shall present to the county court a certified statement of the costs and expenses for which the county is liable; and the "county court shall audit and allow the same." Section 5157 provides that "no costs or fees to the coroner shall be allowed by the county court, in any case of the view of or inquest on a dead body, unless it appears to the court that the coroner, either before or during the view or inquest, had reasonable cause to believe that such body was that of a person who had come to his death by violence or casualty, or who being unknown, was found dead within such county." This action evidently fixes a judicial discretion in the county court, as to the auditing and allowing fees and costs in such cases. This must "appear to the court." And upon the presentation of the certified statement provided for in section 5156, if it does not appear to the court that the coroner had reasonable cause to believe that the body was that of a person who had come to his death by violence or casualty, or who being unknown, was found dead in the county, it is clearly the duty of the court, in the proper exercise of its

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discretion, to reject the account, and refuse to audit and allow the same.

The statute evidently fixes on the county court the duty of deciding on the case before it whether it is such as comes within the law, and for the expenses of which the county is liable. The case of *Boisliniere v. Board of County Commissioners*, 32 Mo. 375, is not in point because the statute has been changed. Under that statute it was the duty of the coroner to decide. Under the present it is made the duty of the county court.

II. Mandamus is one of those extraordinary writs that can be resorted to only when there exists no other specific remedy. *State ex rel. Bohannon v. Howard County Court*. It is never resorted to to enforce the payment of a debt, when it can be collected by suit, unless the tribunal having jurisdiction refuses to act; in which case the order would be, not to render a specific judgment, but to proceed with the cause. *Mansfield v. Fuller*, 50 Mo. 338; *Ward v. Cole County Court*, 50 Mo. 401; *Strahan v. Audrain County Court*, 65 Mo. 644. In this case upon presentation of the expenses and fees for which it is alleged Mississippi county is liable, and the refusal of the court to allow them, there existed the undoubted right to appeal. R. S. 1879, §§ 1210, 1216. A specific legal remedy existed, and hence mandamus will not lie.

The judgment below is reversed and the writ dismissed. All concur.

The State v. Walker.

THE STATE, *Appellant*, v. WALKER.

Criminal Law: INDICTMENT: ROAD-OVERSEER. An indictment under Revised Statutes, section 6944, against one as a road-overseer is sufficient which charges that defendant was, at the time of the commission of the offense, road-overseer of the district, and that it became and was his duty to keep a certain described public road in his district in repair, and that he did unlawfully and willfully fail and neglect to make certain specified repairs in said road, whereby he willfully failed and neglected to discharge his duty as such road-overseer.

Appeal from Scott Circuit Court.—HON. J. D. FOSTER,
Judge.

REVERSED.

D. H. McIntyre, Attorney General, for the State.

The indictment was sufficient. It was not necessary to aver the appointment and qualification of defendant as road-overseer. 2 Bishop Crim. Proc., (3 Ed.) § 822; *State v. Tate*, 5 Blackf. 73; *State v. Harsh*, 6 Blackf. 346; *Dor-mar v. State*, 31 Ark. 49; 2 Chitty Crim. Law, top pp. 181, 254, 255; 2 Wharton Prec. Ind. and Pleas, forms 904, 905, 906. The indictment described the road and charged that it was in defendant's district. It was not necessary to give the boundaries of the district.

Marshall Arnold for respondent.

NORTON, J.—This case is before us on the appeal of the State from the action of the circuit court in sustaining a demurrer to an indictment which reads, after omitting the formal parts, as follows: "That James Walker was on the the 1st day of October, 1881, at the county and state aforesaid, and still is road overseer of road district number six, in Moreland township in said county, and as such had charge of and was overseer on that part of a certain public road leading from Benton to Sylvania, situate and lying in

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said road district, and it then and there became and was the duty of the said James Walker to keep that part of said public road in said district in proper repair, free of obstructions or other hindrances to the convenient use of the same by the public, and that the small water-courses and wet grounds and washes and gullies in said part of said public road were not bridged or causewayed or filled up in such manner as to enable carriages and wagons to pass with safety in the proper use of said public road as a public highway. And the said James Walker being such road overseer, as aforesaid, unlawfully and willfully failed and neglected to bridge or causeway the wet grounds and to bridge the small water-courses and streams and to fill up the gullies and washes in said public road in such manner as to enable horsemen, carriages and wagons to pass with safety, whereby and by reason whereof the said James Walker did unlawfully and willfully fail and neglect to perform and discharge his duties as such road overseer as aforesaid, against the peace and dignity of the State."

I am at loss to perceive any valid grounds for the action of the trial court in sustaining the demurrer to the indictment, inasmuch as it clearly sets forth the fact that defendant was a road overseer, having charge of a certain public road, whose duty it was to keep the same in repair, and that this duty he failed to perform in not causewaying the wet grounds and bridging small water-courses and filling up gullies and washes, so as to enable horsemen and carriages to pass in safety. We are of the opinion that the indictment sets forth with sufficient certainty an offense under sections 6933, 6944, 6959 Revised Statutes. See 2 Bish. Crim. Proc. (3 Ed.) § 822; *State v. Tate*, 5 Blackf. 73.

Judgment reversed and cause remanded. All concur.

Person v. Ozark County.

PERSON V. OZARK COUNTY, *Appellant*.

Criminal Costs, Non-Liability of County for. Prior to the act of 1883, (Sess. Acts, p. 80,) the expense of boarding and lodging juries, kept together by order of the court in cases of felony, was not a proper item of costs, and could not be taxed against the county as such, by the court.

Appeal from Ozark Circuit Court.—HON. J. R. WOODSIDE,
Judge.

REVERSED.

J. B. Winger for appellant.

W. N. Evans for respondent.

HOUGH, C. J.—This is a suit on a county warrant, which the defendant contends was issued without authority of law, and is therefore, void. It is agreed, that said warrant was issued in pursuance of the following order of the county court of Ozark county:

State of Missouri against Elizabeth and Martha Parker.

Bill of costs from Oregon county, Missouri, by the judge of the 13th judicial circuit of Missouri, in the above entitled cause in favor of W. McClelland, sheriff of Oregon county, Missouri, for the sum of \$180 for board of jury in the trial of said cause, and for the sum of \$20, for having in charge said jury, making a total of \$200, which was filed at the last term of this court, and by the court continued until this term of the court, and the same being now taken under consideration by the court and after being fully advised as to the law in the premises, does allow on said bills of costs the following sums, to-wit: For boarding and lodging the jury the sum of \$60, and for having in charge the jury, the sum of \$20, making in all \$80; and it is hereby ordered by the court that the same be paid out of the county contingent fund, and that a warrant be drawn on the treasurer for the sum of \$80 in favor of the said W. McClelland.

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Thereupon the court declared the law to be: "That whereas the county court had passed upon the subject matter for which the county court ordered the warrant to issue, that the defendant was estopped from setting up the defense that the defendant was not liable for the payment of said warrant," and rendered judgment for the plaintiff.

At the time this order was made, the expense of boarding and lodging juries kept together by order of the court in case of felony, was not a proper item of costs, and could not be taxed as such by the court. *State ex rel. Winship v. State Auditor*, 57 Mo. 25; *Bright v. Pike County*, 69 Mo. 519. In 1880, the subject matter of the claim passed upon by the county court, could not be made the basis of a lawful demand against the county. There being no authority whatever, under any circumstances, for such an allowance, as was made to the sheriff of Oregon county, the warrant drawn in pursuance thereof was a nullity. It was a mere gratuity, and cannot be enforced against the county. The failure of the legislature to make provision for the payment of such necessary expenses as were incurred by the sheriff in this case, was doubtless an accidental omission, as they are now provided for by the act of March 8th, 1883, (Sess. Acts 1883, p. 80); but this fact cannot alter our judgment, which must follow the law in force at the time the warrant was issued.

The judgment of the circuit court must, therefore be reversed. The other judges concur.

SPRAGUE, *Appellant*, v. ROONEY *et al.*

1. **Contract: BAWDY HOUSE: EVIDENCE.** A contract to sell a house to one whose purpose is to keep a bawdy house, is not unlawful, and a suit to enforce it cannot be defeated by proof that it was really a contract of lease, and, therefore, invalid.
2. **Parol Evidence, when Inadmissible.** Parol evidence is inadmissible to substitute an invalid parol agreement for a valid one in writing under seal.

Appeal from Jackson Circuit Court.—HON. F. M. BLACK,
Judge.

REVERSED.

Jenkins, Clarke & Thomas for appellant.

The court should not have admitted evidence in support of the answer, as parol evidence is inadmissible to show that the contract was different from that expressed in the writing, if the writing is not ambiguous and was understood by and expressed the intention of the parties at the time it was executed. *McConnell v. Brayner*, 63 Mo. 464; *Frissell v. Mayer*, 13 Mo. App. 331; *Massman v. Holscher*, 49 Mo. 87; *Blackburn v. Harrison*, 39 Mo. 303; *Thompson v. Davenport*, 2 Smith's Leading Cases 371. No evidence should have been admitted, because it allowed the defendant to set up her own fraud to avoid her contract. *Henderson v. Henderson*, 13 Mo. 151; *Hollocher v. Hollocher*, 62 Mo. 267. Nor will the fact that the plaintiff wanted the house for a bawdy house, constitute any ground to avoid the sale. It was as lawful for her, as for any one else to buy it. An act in itself lawful, cannot be adjudged void because done with a corrupt or immoral motive. *Lehendorf v. Shields*, 13 Mo. App. 486; *Alden v. Fenton*, 24 How. (U. S.) 407; *Armstrong v. Toler*, 11 Wheat. 258. The court should have sustained plaintiff's objection to the evidence of the former contract of lease. 1 Greenf. Ev. §§ 2, 50, 51; *Sebree v. Derr*, 9 Wheat. 558, 563. The finding of the trial judge on the evidence was manifestly wrong.

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and should be reversed. *Knowles v. Mercer*, 16 Mo. 455; *Partel v. Bedford*, 51 Miss. 84; *Davis v. Richardson*, 45 Miss. 500.

T. S. B. Slaughter and *Wash Adams* for respondent.

All contracts, in whatever form made, for the purpose and with the intention of furthering an illegal object, are void. See *Brua's Appeal*, 55 Pa. St. 299; *Guenther v. Dewein*, 11 Ia. 133, 135; *White v. Buss*, 3 Cush. 448; *Reynolds v. Nichols*, 12 Ia. 402, 403; *Fowler v. Scully*, 72 Pa. St. 467; *De Groot v. Van Duzer*, 20 Wend. 390. It is also well settled that "parol evidence may be offered to prove that the contract was made for the furtherance of objects forbidden by law," and it is established that this principle does not infringe the rule that parol evidence may not be received to contradict or vary the terms of a written instrument. 1 Greenleaf Ev., §§ 284, 284a. The prior contract of sale which was admitted to be in effect a lease, was admissible for the reason that it tended to show the rental value of the premises.

HENRY, J.—Pending this cause in this court, Jno. Anthony suggested that since the appeal herein was taken, he had intermarried with appellant, and asked to be made a party plaintiff, which was granted. The suit is for the enforcement of specific performance of the following contract in writing, entered into by plaintiff, then Bessie Stevenson, and defendant:

"This article of agreement, entered into this 20th day of February, 1878, by and between Catherine of the one part and Bessie Stevenson of the second part, witnesseth, that the said Catherine has this day bargained and sold to said Bessie Stevenson for the sum of \$2,500, the following real estate, lying and being in the City of Kansas, county of Jackson, State of Missouri, namely: Lot No. 11, block 3 Lykin's addition to the City of Kansas, Old Town, as the same appears on record of the recorded plat of said addi-

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tion, upon the following terms and conditions, to-wit: The said Bessie Stevenson to pay the sum of \$25 per month, payable monthly on the 20th day of each month, until the sum of \$1,000 is thus paid; then the said Catherine Rooney to execute and deliver to said Bessie Stevenson a good and sufficient warrantee deed to the same, taking the notes of the said Bessie Stevenson, secured by deed of trust on the property conveyed, for the same deferred payments. But if said Bessie Stevenson fail or refuse to make any monthly payments as herein provided until deed made, her rights under this agreement to cease, and said Catherine Rooney to be immediately entitled to the possession of said estate. In witness whereof, the parties have set their names and affixed their seals to duplicate copies hereof, one to be retained by each, the day and year aforesaid.

MRS. CATHERINE ROONEY, [SEAL.]

MISS BESSIE STEVENSON, [SEAL]."

The answer set up, in substance, that the contract really made by the parties was one of lease by which the premises were let to plaintiff at \$25 per month, payable monthly, but that in order to evade the statute, section 1551, which forbids the lease of a house for the purpose of being used as a brothel it was agreed between the parties that they should execute the agreement in question. A replication filed put in issue the allegations of the answer, and on a trial of the cause, the court found the issues for defendant and entered a judgment accordingly, from which this appeal was prosecuted. Plaintiff at the trial objected to any evidence in support of the allegations in the answer. Her objection was overruled, and by plaintiff's own testimony, if at all, they were established. Whether the court erred in admitting such evidence is the only question for consideration.

This is not a suit to enforce a contract for a lease of the premises. If it were the doctrine invoked by defendant and sustained by the authorities cited by her counsel

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would be in point. An agreement to sell a house to one whose purpose is to keep it as a bawdy house, although known to the vendor, is not forbidden by the statute. Defendant is endeavoring to defeat a legal and valid contract by proof that it was not the contract between the parties, but that another was, which is forbidden by law. In other words, she seeks by parol evidence to substitute an invalid parol agreement for a valid one in writing and under seal. There is certainly no public interest to be subserved by withdrawing this case from the rule which forbids the introduction of parol evidence to vary or contradict a written instrument. If the contract were for a lease, and the purpose expressed therein was that the lessee would keep a hotel, or conduct other legitimate business in the house, it might be shown by parol evidence that it was let to be used for an illegal purpose. But here is an agreement in writing, signed and sealed by the parties. Its execution is admitted; no fraud is charged to procure defendant's signature to it, but she says it was not the real agreement of the parties, but that the agreement between them rested in parol and was a lease of the premises. In *Brua's Appeal*, 55 Pa. St. 299, cited by defendant's counsel, it was the consideration of the notes which was held open to inquiry, and having been found to be a "stock gambling transaction" the notes were held void. *Fowler v. Scully*, 72 Pa. St. 465, was a proceeding to foreclose a mortgage of real estate given to a national bank to secure future advances, and this appeared upon its face. But if it had not, evidence would have been admissible to show the fact. There is no analogy, however, between such a case and the one under consideration. Here the evidence was not offered to show that the contract sued on was an illegal contract, but to prove that it was not the contract made by the parties. If the statute forbade the sale of premises to be used by the vendee for an illegal purpose, on a suit to enforce the contract, the defendant might show the illegal purpose,

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although a different one was expressed in the contract. To that extent the authorities cited go and no further.

The judgment is reversed and the cause remanded. All concur, except SHERWOOD, J., who dissents

GAINES *et al.* v. FENDER, *Plaintiff in Error*

1. **Foreign Will: EVIDENCE.** A will of a sister state is not inadmissible in evidence here, because it has not been admitted to probate or recorded in the probate court of this state.
2. ———: ———. The will in this case, which was made in Kentucky, *Held* admissible in evidence here, against the objection that its admission to probate in Kentucky was not sufficiently authenticated.
3. **Former Appeal: RES JUDICATA.** The decision of this court in this cause, when here on a former appeal, (57 Mo. 342,) as to the sufficiency of the will to pass title to the land involved in this suit, is *res judicata*.
4. **Will: POWER TO SEVERAL AS EXECUTORS, EXECUTION OF.** Where a power in a will to sell land is given to several as executors, and not as persons, all need not act. The survivor or survivors may, in such case, lawfully execute the power.
5. **Sheriff's Deed: RECITAL OF PARTIES TO EXECUTION.** Where a sheriff's deed recites the parties to the judgment, and that the execution issued thereon, without again naming the parties, and it is clearly inferable that the execution was issued on the judgment named in the deed, the latter is not open to the objection that it fails to recite the names of the parties to the execution as required by the statute. R. S., § 2392.
6. **Taxes, Sale of Land for: STATUTE.** The assessment and other proceedings under the act of the legislature of 1864, (Acts 1863-4, p. 84,) relating to the sale of land for taxes, must have been against the owner of the property.
7. **Practice: INSTRUCTIONS; MOTION FOR NEW TRIAL.** The action of the lower court in giving and refusing instructions, will not be reviewed in the Supreme Court, unless it is assigned for error in the motion for new trial.
8. **Supreme Court, Practice in.** The Supreme Court will not review facts passed upon by the lower court, sitting as a jury.

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Error to Macon Circuit Court.—HON. ANDREW ELLISON,
Judge.

AFFIRMED.

H. Lander for plaintiff in error.

(1) The lower court erred in admitting as evidence the copy of Morrison's will, and in holding the same sufficient to convey or dispose of the land in question. (2) The court also erred in admitting in evidence the deed of Henry Clay to Beckett. A foreign executor as such cannot convey lands in Missouri. *Cabanne v. Skinker*, 56 Mo. 367; *McCarty v. Hall*, 13 Mo. 480. The power given to Clay and Wickliff was accompanied by a personal trust and confidence, and the two should have joined in the conveyance. *Cole v. Wade*, 16 Ves. 27; *Tainter v. Clark*, 13 Met. 220. (3) The sheriff's deed to Ray was improperly admitted in evidence. The names of the parties to the execution should have been recited. *Davis v. Kline*, 76 Mo. 310; *Wilhite v. Wilhite*, 53 Mo. 71; *McCormick v. Fitzmorris*, 39 Mo. 31; *Tanner v. Stine*, 18 Mo. 580. (4) The tax deed of June 14th, 1875, offered in evidence by defendant, should have been admitted. Although dated after the commencement of the suit, it relates back to October 1st, 1868, the time of the tax sale. *Blackwell on Tax Titles*, pp. 452, 454, *et seq.* The tax deed was sufficient under the statute and at common law. *State v. Mantz*, 62 Mo. 252. (5) The trial court erred in refusing to declare the law as asked in defendant's fourth declaration; and also in finding for plaintiffs below on the law and the evidence as regards the defense of two years' adverse possession under the statute of limitations applicable to military bounty lands. *Schultz v. Lindell*, 30 Mo. 310; *Clements v. Runckel*, 34 Mo. 41; *Smith v. Newby*, 13 Mo. 159; *Lander v. Perkins*, 12 Mo. 238; *Dessaunier v. Murphy*, 33 Mo. 148.

A. W. Mullins for defendants in error.

The questions sought to be raised by plaintiff in error as to the legal effect of the Morrison will and its admissibility in evidence, are *res judicata*. *Gaines v. Fender*, 57 Mo. 342. The will was duly probated and admitted to record in Fayette county, Ky., and the probate of a will in another state is a judicial proceeding to the record of which full faith and credit should be given. *Haile v. Hill*, 13 Mo. 612; *Bradstreet v. Kinsella*, 76 Mo. 63. The objection that there was no judicial sentence of probate is not well taken. The evidence of the subscribing witnesses to the will upon which it was admitted to probate need not be recorded. *Charlton v. Brown*, 49 Mo. 353; *Bright v. White*, 8 Mo. 421. It was not necessary in order to the admission of the copy of the will, that such will should have been admitted to probate in this state or recorded in the office of such court, or, indeed, that it should have been recorded in the recorder's office, as it was, of the county where the land lies. *Lewis v. The City of St. Louis*, 69 Mo. 595; *Bradstreet v. Kinsella*, 76 Mo. 63. Of the several persons nominated and appointed executors by the will, Mr. Clay was the only one who qualified, and the conveyance by him to Beckett was a sufficient execution of the power contained in the will. *Dilworth v. Rice*, 48 Mo. 124; *Evans v. Blackiston*, 66 Mo. 437; *Gaines v. Fender*, 57 Mo. 342. The recital in the sheriff's deed to Ray as to the parties to the execution was sufficient. The court did not err in excluding the tax deed, as the evidence showed that the judgment in the tax suit was against James Tower, as owner, whereas he was not the owner, he having conveyed it to James Morrison, April 3, 1819, and the deed was recorded July 14, 1819. *Hume v. Wainscott*, 46 Mo. 145. The defendant's motion for a new trial did not complain of the action of the court in refusing declarations of law and questions thereon cannot be raised here. *Matlock v. Williams*, 59 Mo. 105.

EWING, C.—On the 29th day of February, 1872, plaintiff commenced an action in ejectment in the circuit court of Linn county, afterwards transferred to Macon, to recover possession of the northwest quarter of the northeast quarter of section 36, township 57, range 21. The defendant denied all the allegations of the petition, except that he was in possession, and claimed ownership and title.

The plaintiff offered in evidence :

1. A copy of a patent from the United States to James Tower, dated the 6th of March, 1819, for the whole quarter section, being military bounty land.

2. Certified copy of deed from Tower to James Morrison for whole quarter, dated April 3, 1819. Recorded in Howard county July 14, 1819, when the land in question was part of Howard county.

3. Next read, against defendant's objections, what purported to be a copy of the will of James Morrison, dated December 21, 1820, and claimed to have been probated in Fayette county, Kentucky, in 1823. The will has this clause :

"I devise to Joseph Beckett, husband of my niece, formerly Jane Holmes, \$3,000 worth of land, to be valued to him according to the valuations contained in the aforesaid list." And this clause : "I vest in my executors my whole real estate in trust in fee simple to enable them to carry into effect my will ; with power and authority to convey such parts thereof as I have devised in fee simple ; and with power and authority to sell and convey the residue thereof, including that which will revert to my estate upon the death of my wife for the purposes of my will, and whenever my said executors shall deem proper. But no sale of any portion thereof to be valid without the concurrence of either Henry Clay or Robert Wickliff, two of my executors hereinafter named." Then this clause : "That the land allotted to each devisee shall be designated to each devisee by Henry Clay and Robert Wickliff, and their

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umpire if they cannot agree." Then this clause: "I do nominate and appoint my wife, Esther Morrison, executrix, and Henry Clay, Robert Wickliff, Farmer Dewese and Richard Holmes executors of this my last will and testament."

To which copy are the following certificates:

1. "Fayette County, Sct. May Court, 1823. This last will and testament of James Morrison, deceased, was this day produced in open court, and proven by the oath of Frederick Ridgeway, Hugh Foster and Benjamin Gratz, the three subscribing witnesses thereto, and ordered to be recorded, and the same is therefore truly recorded in my office.

Attest:

JAMES C. RODES, Clerk."

2. Then follows a certificate by the clerk that the schedule of lands which accompanied the will was duly recorded directly after the will.

3.

"STATE OF KENTUCKY, }
Fayette County, } ss.

"I, Allie G. Hunt, clerk of the county court of the county aforesaid, certify that the foregoing contains a correct copy of the last will and testament of James Morrison, deceased, with the certificate of probate of said will, and schedule list of lands as fully and fair as the same appears from the record, and on file in my office.

"Given under my hand and official seal this 25 day of
July, 1875.

{ L. S. }

ALLIE G. HUNT, Clerk."

4. Then follows the certificate of Benj. F. Graves, presiding judge of the Fayette county court, that Allie G. Hunt is clerk and that his attestation is in form as required by the act of congress in relation to certifying judicial proceedings of one State to be used in another.

This copy of the will and certificates numbers 1 and 2

were recorded in the recorder's office of Linn county on the 8th day of December, 1874.

Plaintiffs then read the statutes of Kentucky relative to wills, and defendant insisted, and now insists on the following objections to reading a copy of said will: 1st, No sufficient evidence that the supposed will was ever probated in Kentucky or elsewhere, there being no certified copy of the will, together with the probate thereof, furnished.

2. That the will is not properly authenticated, either under the laws of this State or the act of congress, there being no *judicial sentence of probate* certified or found on the paper.

3. That the will, nor copy thereof, has ever been admitted to probate or recorded in any county in this State.

4. That the will, not having been probated or recorded in this State for more than fifty years after its alleged execution, should be regarded abandoned as a source of title. All these objections the court overruled.

Plaintiffs next read, against defendant's objection, a deed by Henry Clay, executor, to Joseph Beckett, dated November 8, 1823. Recorded in Chariton county September 10, 1826, when the land was a part of Chariton county.

This Clay deed was objected to :

Because the foreign executor had no power to convey the land, he never having qualified as such under the laws of Missouri. Because the power in the will was not well executed by one of five executors, no facts being shown to authorize a survivorship to one executor.

Plaintiffs next read deeds from Joseph Beckett to Thomas Arnold, dated September 15, 1832, recorded in Chariton county November 4, 1834. And Thos. Arnold to Don Carlos Buckland, dated March 5, 1840, recorded in Linn county April 19, 1841; these deeds all covering the whole quarter section.

Next read a sheriff's deed by the sheriff of Linn county, to R. D. Ray, dated April 19, 1841, recorded in Linn county April 21, 1841, which sheriff's deed was prop-

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erly acknowledged and recorded in Linn county on the 21st of April, 1841.

Defendant objected to the sheriff's deed :

Because it does not contain the requisite recitals to make it evidence under the law. Because it does not recite the names of the parties to the execution under which the sale was made.

Next read deeds from R. D. Ray to Alfred Ray, dated January 14, 1842, recorded in Linn county July 10, 1867, and Alfred Ray to Rob. S. Gaines, February 15, 1842, recorded in Linn county March 20, 1844. Next plaintiffs showed the death of Rob. S. Gaines in 1850 and that plaintiffs were his heirs at law. Here plaintiffs rested.

Defendant's case is this :

For color of title to base adverse possession for two years under statute of limitations applicable to military bounty land, he read : 1. Register's deed to W. H. Brownlee, dated October 6, 1865. Sale for taxes, first Monday of October, 1863, for taxes of 1862. Recorded October 16, 1865, in Linn county. 2. W. H. Brownlee to B. Lombard, dated November 9, 1866. Recorded in Linn county, November 29, 1866. 3. B. Lombard to H. Lander, dated December 9, 1868. Recorded January 14, 1869, in Linn county. 4. Collector of Linn county, Missouri, to H. Lander, tax deed dated December 1, 1866, reciting sale Monday, October 1, 1864, for taxes of 1863. Recorded in Linn county April 3, 1868. All the foregoing deeds, both for plaintiffs and defendant, covered the quarter section. 5. A bond for a deed from H. Lander to defendant for the 40 acres in question, dated October 1, 1867. 6. Defendant next offered *as title* a tax deed from the collector of Linn county to H. Lander, dated June 14, 1875, reciting a sale of the whole quarter section for taxes, Monday, October 1, 1868, for taxes of 1867. Recorded June 14, 1875, in Linn county. Which deed was duly acknowledged before the clerk of the county court of said county on the 14th day

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of June, 1875, and duly recorded in Linn county on the same day of its date.

To the reading of which plaintiffs objected as follows:

1. The land was not assessed against any one as appears from the face of the deed. 2. The tax deed does not show that any owner of the land was notified for judgment. 3. The deed does not state the amount of the judgment. 4. The deed does not show when the collector made his return. The court against said objections admitted the deed as evidence of title, and plaintiffs excepted.

Plaintiff then offered evidence that the land was assessed to James Tower, as owner, notice for judgment given, and the judgment rendered against James Tower. That he was not the owner, having conveyed it to James Morrison April 3, 1819, and which deed was recorded July 14, 1819. The court then excluded the tax deed and rendered judgment for the plaintiffs from which the defendant sues out a writ of error to this court.

I. The first objection to the will of Morrison as evidence, seems to be that there was no judicial sentence of probate in Kentucky, and hence not probated or proven according to the laws of Kentucky. The record shows this statement immediately following the copy of the will and the names of the subscribing witness thereto:

"Fayette county, sct. May court, 1823. This last will and testament of Jas. Morrison, deceased, was this day produced in open court and proved by the oath of Frederick Ridgeway, Hugh Foster and Benjamin Gratz, the subscribing witnesses thereto, and ordered to be recorded; and the same is therefore truly recorded in my office.

Attest:

JAS. C. RODES, Clerk."

Then comes the legal certificates of the clerk and presiding justice of the Fayette county court. All of which appears to have been recorded in the recorder's office of Linn county, Missouri.

It was not necessary in order to the admission of the copy of the will, that such will should have been admitted

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to probate in this State, or recorded in the office of such court. *Lewis v. The City of St. Louis*, 69 Mo. 595; *Bradstreet v. Kinsella*, 76 Mo. 63. See, also, *Bright v. White*, 8 Mo. 421; *Haile v. Hill*, 13 Mo. 618. The only objection to its authentication was that there was "no judicial sentence of probate certified or found on the paper." The foregoing purports to be a properly authenticated copy of the record of the Kentucky court admitting the will to probate, which is all that would seem to be required.

II. The next objection made by the plaintiff is error is that the will is not sufficient to convey land in Missouri. This question is not open for inquiry here. It is *res judicata*. This case was here in 1874, 57 Mo. 342, where it is said: "This will was objected to by the defendant on the ground that all evidence in the cause does not aid the description or supply proof of identity as to the land in controversy; and, 2d, That all the evidence fails to furnish sufficient proof that the land in question ever passed by the will.

* * We are of the opinion that by a fair construction of the whole instrument, the land in controversy is properly included and passed by the will to the executors to answer the bequests made."

III. It is insisted that the deed made by the executor, Mr. Clay, alone is not valid. That the will showing the appointment of several as executors, one cannot act. This must depend upon the construction of the will. If it creates a power by name to the executors—a mere naked power—it cannot be executed by one, all must act. Story's Eq. Jurisp., sec. 1062. But if coupled with an interest, or trust, then the survivor or survivors may lawfully execute the power. *Franklin v. Osgood*, 14 Johns. 526; Story's Eq., § 1061; *State to use Watts v. Boon*, 44 Mo. 254, and authorities there cited. If a testator should give A and B authority to sell his real estate, and should appoint them his executors, the survivor could not sell. But if he should direct his executors to sell and should appoint A and B his executors, the survivor could execute the power and sell. Story's Eq.,

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sec. 1062; *Butler & Hargrave's*, n. 2, 1—Coke Litt. 113 a. In the case at bar the clause in the will is: "I vest in my executors my whole real estate in trust in fee simple, to enable them to carry into effect my will; with power and authority to convey such parts thereof as I have devised, in fee simple. * * * But no sale of any portion thereof to be valid without the concurrence of either Henry Clay or Robert Wickliff, two of my executors hereinafter named. * * * That the land allotted to each devisee, shall be designated to each devisee by Henry Clay and Robert Wickliff, and their umpire if they cannot agree. * * * I do nominate and appoint my wife, Esther Morrison, executrix, and Henry Clay, Robert Wickliff, Farmer Dewese and Richard Holmes executors of this my last will and testament."

The power here is given to the executors, and not to the persons. It is a power granted for the benefit of the heirs of the testator and, therefore, a trust, and not a naked power. Story's Eq., sec. 1062; 14 Johns. *supra*.

The deed then purports to be "between Henry Clay, only acting executor of James Morrison, deceased, and Esther Morrison, Robert Wickliff, Farmer Dewese and Richard Holmes, nominated but who have not qualified or acted as executrix and executors, of the said Morrison." And again: "And whereas the said Henry Clay, acting executor aforesaid, with the assent of the said Robert Wickliff," etc. It is then signed "Henry Clay, only acting executor of James Morrison, deceased," and also signed and acknowledged by the other nominated, but non-acting executors.

The 25th section, 1 Ter. Law Mo., 925, provides that conveyance of lands and tenements to be sold in pursuance of will shall be made by the executors or such of them as shall undertake the execution of the same or by the surviving executors," etc. If the title was vested in Morrison's executors, those alone who qualify and act, can be said to be executors.

IV. The defendant objected to the introduction of the sheriff's deed to R. D. Ray, because, as is alleged, it does not recite the names of the parties to the execution as required by the statute, section 2392, R. S. 1879. The deed contains this recital: "That whereas, William Bell, John S. Evans and John Bell, on the 10th day of December, 1840, in the circuit court of Carroll county, Missouri, recovered judgment against one Don Carlos Buckland for the sum," etc., and, "On the 28th day of January, A. D. 1841, execution issued * * * upon said judgment." Here the names of the parties, to the judgment, its date and amount are specifically set out in the deed; that on a date thereafter named execution issued "on said judgment" without again naming the parties. In this case, as in *Wack v. Stevenson*, 54 Mo. 481, we think, it is "clearly inferable" that the execution was issued on the judgment set out in the deed, giving all the names and other requisites. This omission to repeat the names of the parties in the deed, when no one could be possibly misled thereby, is not regarded as fatal to the deed. In *Wilhite v. Wilhite*, 53 Mo. 71, the deed recited the judgment as against Chambers and Yates, as did also the execution, whereas the judgment was against Chambers alone. Also that the judgment was for \$350, whereas the judgment itself was for \$350.50. The court held those were "matters of form and not of substance" and did not render the deed void.

V. It is insisted by the plaintiff in error that the court erred in excluding the deed from the collector of Linn county to H. Lander dated June 14, 1875, under a sale for the taxes of 1867. The plaintiffs objected to the introduction of this deed:

"Because the land was not assessed against any one as appears from the face of the deed. It does not show that any owner of the land was notified for judgment. It does not state the amount of the judgment, nor does it show when the collector made his returns." This deed was made by authority of the act of 1864, Genl. St. 1865, p. 98.

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and in opposition to its introduction as evidence of title, plaintiffs offered the assessor's books of Linn county, showing that the land in controversy was assessed to one James Tower and the judgment of the county court against said land for taxes. The court thereupon excluded the deed as evidence of title. This act of 1864 was passed upon by this court in *Abbott v. Lindenbower*, 42 Mo. 162, where it was held that under that act the assessment and other proceedings must be directed against the owner of the property. The will of Morrison, and the deed from Clay, his executor, to Beckett, were recorded in the county, where the land was situated when filed for record, which is all that the registry laws require. So, also, was the deed from Beckett to Arnold, whilst the other conveyances were not recorded in Linn county, and hence the assessor had the means before him to ascertain that the land did not belong to James Tower, who, the records show, was not the real nor apparent owner at the date of assessment. *Hubbard v. Gilpin*, 57 Mo. 441; *Hume v. Wainscott*, 46 Mo. 145; *Abbott v. Lindenbower*, 46 Mo. 291; *Abbott v. Lindenbower*, 42 Mo. 162.

VI. There are no instructions in the record for the plaintiffs, given or refused. The defendant asked five instructions, four of which were refused and one given; but in the motion for a new trial no reference whatever is made to instructions on either side. The attention of the court below was not called to the refused instructions as error, and according to the uniform practice of this court there can be no further notice taken here of such refusal. *Carlisle v. The Keokuk Northern Line Packet Co.*, ante, p. 40; *Matlock v. Williams*, 59 Mo. 105; *Boyse v. Burt*, 34 Mo. 74; *Cowen v. St. L. & I. M. Ry. Co.*, 48 Mo. 556; *Gordon v. Gordon*, 13 Mo. 215; *Powers v. Allen*, 14 Mo. 367. It will not be improper, however, to remark that, after the rejection of the defendant's tax deed, dated June, 1875, it was error to give instruction number five for defendant to the effect that, that tax deed "is of itself *prima facie* evidence of title

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to the land in question, and is sufficient to defeat plaintiffs' right to recover the premises in question." But, as the deed upon which this instruction was based had been excluded, and the trial was by the court, no harm came from the instruction, even if it had been referred to as error in the motion for a new trial.

VII. As to the question of adverse possession and limitation, the facts have been passed on by the court sitting as a jury, and in the absence of instructions this court will not undertake to review the facts. In *Hamilton v. Boggess*, 63 Mo. 233, Judge Napton said: "When a case is submitted to a court and a jury dispensed with, the facts upon which the court bases its judgment are incontrovertible here. This court has only the power to review the law declared by the court below, and when that court is intrusted with both the facts and the law, we must assume the facts to be as that court finds them."

Let the judgment be affirmed. All concur.

THE STATE *ex rel.* RICHARDSON, *Administrator*, v. JAMES *et al.*,
Appellants.

1. **Probate Court: EXECUTOR: BOND: SURETIES.** Where a probate court having proper jurisdiction finds there are sufficient funds of the estate in the hands of the executor for the purpose and orders the payment of an allowance, and such order is not appealed from, nor vacated for fraud or other reason, it is binding on the executor and his sureties in an action on the bond.
2. **Executor: BOND, BREACH OF.** The failure to pay such allowance after the making of the order, is a breach of the obligation of the bond "to perform all other things touching said executorship required by law or the order or decree of any court having jurisdiction."
3. **Sureties: BOND.** In an action for such breach of the bond, the sureties as a defense *pro tanto*, cannot claim that they are liable only to the extent of the funds of the estate in the hands of the executor at the date of the execution of the bond.

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4. **Probate Court: MOTION: NOTICE.** The action of the probate court in sustaining a motion to set aside an order for the payment of an allowance because the order did not state the specific amount to be paid, and its entry of a new order in lieu of the former, is really one transaction, and an executor who filed the motion is chargeable with notice of the entry of the last order.
5. **Judgment, when not a bar.** A judgment is not a bar to another action, when it does not appear that the subject matter of the two actions is the same.

Appeal from Jasper Circuit Court.—HON. JOSEPH CRAVENS,
Judge.

AFFIRMED.

Ewing & Hough, for appellants.

(1) The sureties are not responsible for a default of the executor made prior to the date of the bond. (2) The suit and judgment in 1878 are a bar to the present action. R. S. § 581. (3) The settlement made by James, May 29th, 1876, is conclusive that he did not have in his hands \$2,523.95 as per order of the court. (4) The court had no power to make the order directing the administrator to pay to respondent \$2,523.94. The order is not in conformity to R. S. §§ 233, 234, and was made without notice to the administrator.

F. P. Wright for respondent.

The settlement in 1867 was a judgment and is not presumed to be paid within twenty years. Plaintiff had the option to pursue the summary remedy provided by the statute, or to bring an action on the bond. *Wickham v. Page*, 49 Mo. 526. The breach sued for was a failure to obey "an order and a decree of a court of competent jurisdiction." The action was properly brought on the second bond. *State to use of, etc. v. Berning*, 74 Mo. 98; *State to use v. Drury*, 36 Mo. 281. Suit may always be brought on the bond of a deceased executor and his secur-

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ities made liable. *Wickham v. Page*, 49 Mo. 526. *State, etc. v. Drury*, 36 Mo. 281.

W. H. Phelps also for respondent.

The settlement between the relator as the successor of Elwood B. James, and the executors of said James, has the force and effect of an allowance of a demand against the estate of said James. Gen. St. 1865, chap. 147, § 47; *Seymour v. Seymour*, 67 Mo. 303. The defense that the settlement is not a demand or is barred by the statute of limitations, should have been made before the probate court at the time the order to pay respondent was made, and cannot be made in this suit any more than the defense that the administrator had no money in his hands out of which to pay the demand. *State ex rel. Wolf v. Berning*, 74 Mo. 87. The order of the probate court requiring James to pay the demand, is conclusive upon defendants, and in a suit upon the bond the defendants are not permitted to show that there was no money in his hands with which to pay it. *State v. Holt*, 27 Mo. 340; *Taylor v. Hunt*, 34 Mo. 205; *State v. Rucker*, 59 Mo. 17; *State ex rel. Frost v. Crensbaur*, 68 Mo. 254. No notice to James was necessary. The order to pay the demand was made at the time of the making his settlement when he was in court, and he filed a motion to set aside the order to pay the demand, which was sustained by the court, because the sum to be paid was not inserted, and the order in question immediately entered.

RAY, J.—The agreed abstract of the record in this case is as follows, to-wit:

“In the year 1859 Susannah Richardson died and Elwood B. James became the executor of the last will and testament of deceased. Afterwards, in the year 1860, Elwood B. James died testate, and D. S. Holman, W. G. Bulgin and M. M. James became his executors, and entered into a joint bond as such executors, and proceeded to exe-

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cute said trust. On the 12th day of July, 1867, the county court of Jasper county, on a settlement between respondent and the executors of Elwood B. James, deceased, found by its order, entered of record, that said Elwood B. James at the time of his death was indebted to the estate of said Susannah Richardson in the sum of \$2,683.03 on account of assets of said estate which came to his hands as such executor. In August, 1868, the letters of executorship of W. G. Bulgin were revoked by the county court of Jasper county, and thereafter Holman and James acted as joint executors until in May, 1876, the letters of Holman were revoked by the common pleas court of Jasper county, and M. M. James was appointed sole executor, and ordered to give a new bond. That the bond sued on was given by James as sole executor, and the other appellants as securities, on the 29th day of May, 1876, and, at the same time and on the same day, said James made a settlement in said common pleas court showing a balance in his hands of \$444.84, which was approved by the court. The same settlement shows that said executor, M. M. James, had paid to the heirs and legatees of Elwood B. James \$3,653.93 since the allowance of plaintiff's demand, and for which he demanded and took credit. At the same time the court made an order requiring said James to pay the balance unpaid of plaintiff's demand, but did not fix the amount to be paid, and on motion of M. M. James, the executor, said order was set aside and another was immediately entered setting forth the amount ascertained to be due and unpaid on the demand on the 13th day of June, 1876, in the sum of \$2,523.94. This was all done on adjourned days of the April term of said court. No notice was given to James, who testified he knew nothing of the making of said order until long after the time had elapsed.

On the 11th day of November, 1876, the letters of executorship of M. M. James were revoked, and Thomas Buckbee, public administrator, was appointed his successor, and immediately brought suit on the bond of James, Car-

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ter and Walser, and on October 4th, 1878, recovered judgment in the circuit court of Jasper county for \$581.09, and afterwards this suit was brought, to-wit: October 9th, 1878.

Upon this record, the appellants insist that the sureties in the bond sued on are only liable for the amount of funds in the hands of the executor at the date of the bond, and such as might thereafter come into his hands as such; and that in no event, are they liable for any default or misconduct of the executor, occurring anterior to the date of said bond. Appellants also insist that the settlement of the probate court of Jasper county, of the 12th of July, 1867, was not a judgment or demand against the estate of Elwood B. James, deceased, and if it was, that it was barred by the statute of limitations; and further, that the court had no power or jurisdiction to make the order of June the 13th, 1876, requiring the executor to pay the balance of plaintiff's demand, due and unpaid on the settlement of July 12th, 1867; and if it had, that said order was void for want of notice to said executor. Appellants further contend that the judgment of the Jasper circuit court, of the 4th of October, 1878, recovered by Buckbee, as successor of said James in a suit on the bond in question, is a bar to this action.

In the first place, it may be well to recur to the conditions of the bond sued on, which the record shows to be as follows: "That if M. M. James, executor of the last will of Elwood B. James, deceased, shall faithfully execute the said will, account for all money and property that shall come into his hands, as the property of the deceased, according to the provisions of said will; and perform all other things touching said executorship required by law, or the order or decree of any court having jurisdiction, the above bond to be void, otherwise to remain in full force." By the terms of the bond, it will be observed that the executor, (for whose default the sureties are liable) not only bound himself to account for all money and property that should come into his hands as the property of the deceased,

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according to the provisions of the will, but also, bound himself to "perform all other things touching such executorship, required by law, or the order or decree of any court having jurisdiction." The breach of the bond complained of in this case as shown by the record, was that the defendant, James, had failed, neglected and refused to pay plaintiff the said sum of money, so ordered and required to be paid by said order of June 13th, 1876. If, therefore, the court had jurisdiction to make the order, it is final in its nature and binding on the executor with notice, so long as the same remains unappealed from and unset aside for fraud or otherwise, and if binding on the executor, it is conclusive on his sureties also. There is no pretense that said order was appealed from, or otherwise set aside.

The recovery, also is shown to be for a default of the executor, occurring subsequent to the date of the bond sued on, and for which the sureties in said bond are clearly liable. The condition of said bond, as has been seen, was that said executor should, besides other specified duties, also "perform all other things touching said executorship required by law, or the order or decree of any court having jurisdiction." To hold the sureties, therefore, concluded by the order in question, is but holding them to their agreement. This point has repeatedly been ruled by this court. *Taylor v. Hunt*, 34 Mo. 208; *State v. Holt*, 27 Mo. 340; *State ex rel. v. Rucker*, 59 Mo. 24; *Dix v. Morris*, 66 Mo. 514; *State ex rel. Frost v. Creusbauer*, 68 Mo. 254. Section 47 of art. 1, of the administration law, 1 Wag. St., page 77, provides that, "If any executor or administrator die, resign, or his letters be revoked, he or his legal representatives shall account for, pay and deliver to his successor, or to the surviving or remaining executor or administrator, all money, real and personal property of every kind, and all rights, credits, deeds and evidences of debt, and such papers of every kind, of the deceased, at such times and in such manner as the court shall order, on final settlement with such executor or administrator, or his legal representatives." The settle-

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ment of July the 12th, 1867, manifestly was made by the authority, and in discharge of the duty imposed on said executors, by said section; and, as the record shows, on their application. The settlement so made, is, therefore, clearly within the jurisdiction of the court, is final in its nature, and has the force and effect of a general judgment. *Seymour v. Seymour*, 67 Mo. 303. Nothing whatever remained for the court to do in that behalf, except to order the executor to pay the amount so found due to the plaintiff, and nothing whatever was left for the executor except to comply with the order when so made. That order might have been made at the time of the settlement, or thereafter, so long as the same or any part thereof remained due and unpaid.

Said order of the 13th of June, 1876, requiring said payment, as shown by the record, is for the balance due and unpaid on the settlement of the 12th of July, 1867, and reads as follows: "Now at this day appearing to the court, from the settlement of M. M. James, executor of E. B. James, deceased, that there is sufficient money in the lands of said executor, M. M. James, to pay the demand against said estate; it is ordered by the court, that M. M. James, executor aforesaid, pay to B.W.W. Richardson, administrator of the estate of Susannah Richardson, deceased, the sum of \$2,523.94, being the balance on the demand allowed July 12th, 1867, for \$2,683.07 cents." The entry is in the nature of a judgment, as well as an order. It ascertains the amount of the balance due, on the original settlement and orders its payment to the plaintiff.

The first entry made by the court on this occasion it seems, was "an order requiring said James to pay the balance, unpaid on plaintiff's demand, but did not fix the amount to be paid, and on motion of M. M. James, the executor, said order was set aside, and another order was immediately entered, setting forth the amount ascertained to be due and unpaid to the demand, on the 13th day of June, 1876, in the sum of \$2,523.94." From this statement, we

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think, it is clearly to be held that James was present in court when the first order was made and had notice thereof, and made a motion to set the same aside. We think, also, that it is clearly to be held, that the action of the court in setting aside the first order and the entry of the second, is to be taken and considered as one entire transaction, the object of which appears to have been to make that certain which before was uncertain, and that in contemplation of law, he is chargeable with notice of the disposition of his motion and what followed immediately thereon, as a part of the same transaction. The fact, if such was the case, that the motion may have been filed on one day and disposed of on another day of the same term, we think, under the circumstances should make no difference, as he is chargeable with notice of its disposition, whether occurring on the same, or another day of the same term, especially, when as in this case the action of the court in sustaining his motion and the entry of the new order modifying the old, was practically one and the same transaction.

We think this order was, also, clearly within the jurisdiction of the court, and that the executor is chargeable with notice thereof, and that it was wholly unnecessary to give him any formal or other notice, than that which the law, under the circumstances imputes to him. This order also, is final in its nature, and remaining unappealed from and unset aside for fraud or otherwise, is binding upon the executor, and conclusive on his sureties and cannot be attacked or impeached in a collateral proceeding like this. Whatever objection or defense the executor may have had to it, if any should have been made in the probate court, when the order was made and if unavailing then, he should have appealed therefrom, and in default thereof is concluded thereby. *Dix v. Morris*, 66 Mo. 514; *State v. Holt*, 27 Mo. 340; *State v. Rucker*, 59 Mo. 17; *Taylor v. Hunt*, 34 Mo. 205; *State ex rel. Frost v. Creusbauer*, 68 Mo. 254; *Herndon v. Hawkins*, 65 Mo. 265; *Holt Co. v. Harmon*, 59 Mo. 166;

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Bailey v. McGinnis, 57 Mo. 362; 56 Mo. 28; 51 Mo. 241, and 436.

The remaining objection, that the judgment of the Jasper circuit court of October 4th, 1878, recovered by Buckbee, as successor to said James, against the executor and his sureties in a suit on the bond in question, is a bar to this action, is we think, not well taken. It does not appear by the abstract, that the subject matter of this action was in any way involved in the Buckbee suit. Any and every party injured by the breach of the bond may recover damages therefor. § 9, art. 8, administration law, 1 Wag. St., p. 118. Section 47 of article 1, 1 Wag. St., page 77, imposes upon the legal representatives of a deceased executor, or administrator in a case like this, a special duty, in addition to that resting on an ordinary executor or administrator. By this section it is made his special duty "to account for, pay and deliver to the successor of such executor or administrator, all moneys, property, etc., of the deceased at such times, and in such manner as the court shall order," on final settlement with his legal representative. The only remaining duty of such legal representative in that behalf, as we have seen, is to comply with said order when made. After that, however, he proceeds with the administration of the estate belonging properly to the deceased, in the ordinary way. The latter is the principal, the former an incident. For aught that appears to the contrary, the suit of Buckbee, as successor to James, was to recover the balance of the estate belonging properly to the original executor, and not that due from him to his testator, or his successor, in such executorship. Most likely, such was the fact in this case. Other objections mentioned in the briefs of counsel, are not deemed material to the proper disposition of the case.

We fail to discover any error in the record and the judgment of the trial court is affirmed. All concur.

McVeagh v. Baxter.

McVEAGH *et al.*, Appellants, v. BAXTER *et al.*; CURTISS, Interpleader.

Fraudulent Sale: CREDITOR: DEBTOR. A creditor cannot purchase the goods of his debtor at a price in excess of his debt, when he knows that the excess so paid such debtor is by the latter to be placed beyond the reach of his other creditors. Such purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not.

Appeal from Jackson Circuit Court.—HON. F. M. BLACK, Judge.

REVERSED.

Karnes & Ess for appellants.

Instruction number two given for the interpleader, Curtiss, is in direct conflict with numbers one and four, given for the plaintiffs in the attachment. If one, knowing that a debtor is selling his property to hinder, delay or avoid the payment of his debts, buys it, and pays the full value for it, such sales will be adjudged fraudulent. *Shelley v. Boothe*, 73 Mo. 74; *Bump on Fraud. Con.*, (3 Ed.) pp. 199, *et seq*; *Clements v. Moore*, 6 Wall. 299; *Fishel v. Lockard*, 52 Ga. 632; *Christian v. Greenwood*, 23 Ark. 258; *Weisiger v. Chisholm*, 22 Tex. 670; *Gardinier v. Otis*, 13 Wis. 460; *Harrison v. Jaquess*, 29 Ind. 208; *State to use, etc., v. Estel*, 6 Mo. App. 6. It is not necessary that the purchaser should have meant to aid and assist the debtor in defrauding his other creditors. If he knew that such was his purpose and design in transferring the property, that is sufficient. The creditor will be permitted, if necessary, to take to himself the entire property of the debtor to secure his debt, even though the debtor declare his intention in making such a transfer to be to hinder and delay other creditors.

Lathrop & Smith for respondent.

(1) The first instruction given for the interpleader is a correct declaration of the law. *State to use, etc., v. Laurie*, 1 Mo. App. 370; *Forrester v. Moore*, 77 Mo. 651; *Thornton v. Tandy*, 39 Tex. 544. (2) It was not error to give the second instruction for the interpleader. *Little v. Eddy*, 14 Mo. 160; *State to use v. Laurie, supra*; *Shelley v. Boothe*, 73 Mo. 74; *Gaff v. Stern*, 12 Mo. App. 115; *Forrester v. Moore, supra*; *Dudley v. Danforth*, 61 N. Y. 626. (3) Under the facts of the case the fifth instruction for the interpleader was entirely proper. *Beurmann v. Van Buren*, 44 Mich. 496; *State to use v. Laurie, supra*; *Gaff v. Stern, supra*; *Forrester v. Moore, supra*. Plaintiffs' instructions numbered one and four, ought not to have been given. But the verdict having been against plaintiffs in the face of instructions far more favorable to them than the law would warrant, they cannot be heard to complain because they were given, or because they were inconsistent with others which properly declared the law. *Thornton v. Tandy, supra*; *Little v. Eddy*, 14 Mo. 160, 164; *Smith v. City of St. Joseph*, 45 Mo. 449, 452.

HENRY, J.—The defendants, Baxter & Tuttle, were retail grocery merchants in Kansas City, and on December 7th, 1880, owed Curtiss \$605 for borrowed money, and a firm in which Curtiss had an interest, \$630 for merchandise. They also owed one Tomlinson \$150, and Lathrop & Smith, attorneys, \$100 for professional services. They were also indebted to the plaintiffs in the sum of \$1,260. Baxter & Tuttle were insolvent, and Curtiss, in order to secure the debt they owed him, on the 7th day of December, 1880, purchased their stock of goods at the price of \$2,485, which was paid by receipting to them for the amount they owed him and the firm in which he was concerned, by the assumption of Tomlinson and Lathrop & Smith's debts and payment of \$500 to each of defendants.

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Plaintiffs sued Baxter & Tuttle in attachment, and Curtiss filed an interplea, claiming the property in question upon which the officer had levied the attachment. On this interplea there was a trial, which resulted in a verdict for the interpleader and a judgment accordingly, from which this appeal is taken.

The evidence in behalf of the interpleader tended to prove that his object in buying the property was to secure his debt, and that he would not otherwise have made the purchase; that the price paid was a fair valuation of the goods, and that there was no intention on his part to hinder or delay other creditors, or to place beyond their reach the \$1,000 cash paid to Baxter & Tuttle. On the other hand evidence adduced by plaintiffs tended to prove that Baxter & Tuttle sold to Curtiss, not only for the purpose of preferring him, Lathrop & Smith, Tomlinson and Sauer & Co., the firm in which Curtiss was concerned, but, also, for the further purpose of securing to themselves the \$1,000 paid to them and placing it beyond the reach of their other creditors, and that Curtiss had knowledge of such purpose.

The court gave, at the instance of the interpleader, the following instruction, among others:

2. Even though the jury may believe from the evidence that Baxter & Tuttle may have intended to hinder, delay or defraud their creditors by the sale of the goods in controversy to Curtiss, yet such intention does not affect the rights of Curtiss under said sale, unless the jury further find that said Curtiss, knowing such intention on the part of Baxter & Tuttle, meant by such purchase to aid and assist said Baxter & Tuttle in so hindering, delaying or defrauding their creditors, and not merely to honestly secure his own debt.

Instructions were also given at the instance of plaintiffs, to the effect that if Baxter & Tuttle had a purpose in making the sale to Curtiss to place the \$1,000 beyond the reach of their other creditors, and Curtiss had knowledge that such was their purpose, the sale was void. There was a

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palpable conflict between the latter and the former, which declared in effect that before the jury could find the sale fraudulent they should not only find that Curtiss knew of the fraudulent intent of Baxter & Tuttle, but, also, that he meant by such purchase to aid and assist them in effecting that purpose, while by the latter instruction they were told that if Curtiss had knowledge that such was their purpose the sale was void.

Respondents' attorneys rely upon *Shelley v. Boothe*, 73 Mo. 74, and *Forrester v. Moore*, 77 Mo. 651, as enunciating the doctrine declared in the first of the above instructions. On a careful examination of these cases it will be found that they sanction no such principle in a case like the one at bar. In *Shelley v. Boothe*, Way & Smith had transferred their goods in payment of the debts of certain of their creditors, and under that transfer they had been sold and bought by plaintiffs, and the proceeds applied to the payment of Way & Smith's debts. The defendant had a suit pending against Way & Smith at the time of the transfer, and plaintiffs had knowledge of the pendency of that suit at the time of the transfer, and purchased with knowledge of the facts. One of the instructions given in that case was that: "If Way & Smith, in making the conveyance of the goods in suit, intended to delay J. W. Wood & Co., their creditors, and if the plaintiff * * * was aware of such intent," the verdict should be for the defendant. The court recognized the right of a debtor to prefer one or more creditors, and that the fact that one creditor had a suit pending against the debtor, did not interfere with this right, the exercise of which would necessarily hinder and delay the creditor who had sued, even though the intent of the debtor, known to the purchaser, was to hinder and delay the suing creditor. The case lacks one essential feature to make it bear a resemblance to this. All the money paid for the goods there was appropriated to payment of the debtors' debts. But suppose that a creditor to the amount of \$100 should purchase his

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debtor's stock of goods worth \$1,000, paying him in cash the difference, \$900, with knowledge that another creditor had a suit pending against the debtor for \$500, and that the debtor intended to appropriate to his own use the \$900 so paid, will it be insisted that *Shelley v. Boothe* upholds such a transaction as *bona fide*? If such be the law, then a creditor to the amount of \$10 can purchase his debtor's goods of the value of \$1,000, with knowledge that the latter intends, instead of appropriating the money to the payment of his debts, to place it beyond the reach of his creditors. There is no honesty or good faith in such a transaction. The creditor who purchases under such circumstances is a participant in the fraud of his debtor. Whether his purpose be to aid him or not, he does, from the very nature of the transaction, aid him in perpetrating the fraud he contemplates.

There is no analogy between this and the case of *Shelley v. Boothe*, *supra*. In that case it is observed that: "There is a class of cases to which the doctrine asserted in the instruction applies. * * * But cases of this kind should not be confounded with those which only amount to giving a preference to one creditor over another."

Judgment reversed and cause remanded.

FARE *et al.* v. GUNTER, *Plaintiff in Error.*

Practice: APPEARANCE: JURISDICTION. The appearance of a defendant in the circuit court, on appeal from a justice of the peace, for the sole purpose of filing a plea in abatement, is not such an appearance to the action as to forbid his raising the question of jurisdiction. And where it appears he was served with summons in the township where he resided, which does not adjoin that in which suit was brought, the action should be dismissed on his motion. R. S., § 2839.

Error to Lawrence Circuit Court.—HON. M. G. MCGREGOR,
Judge.

REVERSED.

Henry Brumback for plaintiff in error.

A. G. McCune for defendant in error.

NORTON, J.—It appears from the record in this case that the suit, which was by attachment, was commenced before a justice of the peace in Turnback township, Lawrence county. Defendant resided in and was served with summons in Lincoln township, in said county. Defendant made no appearance before the justice of the peace, and judgment was rendered against him by default. He afterwards moved to set aside this judgment, appearing for that purpose only, which motion being overruled, he appealed to the circuit court, and, appearing only for that purpose in the circuit court, filed his plea in abatement to the attachment, and on motion of plaintiffs, was required to give another attachment bond, which not being given, the attachment was dissolved, whereupon defendant filed his motion to dismiss the suit, basing it on the ground that, as the suit was brought before a justice of the peace in Turnback township, and defendant was not at the time and never had been a resident of said township, but was served with summons in Lincoln township where he resided, and which was not adjoining Turnback township, the justice acquired no jurisdiction. The court overruled the motion and rendered judgment by default, from which action of the court defendant has prosecuted his writ of error to this court.

Under our ruling in the cases of *Brackett v. Brackett*, 61 Mo. 221, and *Peery v. Harper*, 42 Mo. 131, the appearance of defendant in the circuit court, for the sole purpose of filing a plea in abatement, was not such an appearance to

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the action as to forbid his raising the question of jurisdiction, as he did in his motion; and it appearing that the suit was brought in Turnback township in which defendant did not reside, and service of the summons was had in Lincoln township, where he did reside, and which was not an adjoining township to Turnback township, the justice acquired no jurisdiction, inasmuch as it is provided in section 2839, Revised Statutes, that every action cognizable before a justice of the peace shall be brought before some justice of the township, 1st, Where the defendant resides, or any adjoining township; or 2nd, Wherein the plaintiff resides and the defendant may be found.

It, therefore, follows that the court erred in overruling defendant's motion, and the judgment is hereby reversed and suit dismissed, in which all concur.

McKEE v. LOGAN *et al.*, Appellants.

1. **Sale, Motion to set aside:** MISTAKE OF OFFICER. A sheriff's sale will be set aside at the return day thereof for the mistake and oversight of the officer in making it, when shown to have operated injuriously to the interests of the complainant.
2. ———: NOTICE. All persons interested should have notice of a motion to set aside a sheriff's sale, otherwise their rights will in no manner be affected by the proceeding. But where the officer who made the sale has no direct interest in its maintenance, notice to him would not seem to be necessary.
3. ———: ———. Where the purchasers at the execution sale are present and resist the motion to set the same aside, they cannot be heard to complain of want of notice to the sheriff and the plaintiff in the execution.

Appeal from Clinton Circuit Court.—HON. GEO. W. DUNN,
Judge.

AFFIRMED.

J. M. Lowe and J. F. Harwood for appellants.

The purchasers were bound when the property was struck off to them. R. S., §§ 2384, 2385. And after the sheriff had received their money they were entitled to a deed. If Maret was liable for the taxes, plaintiff has an effective remedy at law for damages, and relief cannot be granted. *Holden v. Vaughan*, 64 Mo. 588. Notice must be given the plaintiff in execution, because a vacation of the sale destroys his right to the money realized therefrom. *Freeman on Ex.*, 306; *McKinney v. Jones*, 7 Tex. 588; *Good v. Coombs*, 28 Tex. 34; *Cline v. Green*, 1 Blackf. 53. No notice was given the plaintiff in execution or the sheriff making the sale. They and the purchaser were all parties in interest. *Freeman on Ex.*, § 306; *Beach v. Dennis*, 47 Ala. 262. It has been held that a sale will not be set aside for an act of the officer of which the purchaser was both innocent and ignorant. *Outcalt v. Disborough*, 2 Green's Ch. 214.

Thomas J. Porter for respondent.

The property was sold by mistake and oversight of the sheriff. It is the settled law that purchasers at execution sales buy at their peril, subject to the power and control of the court over its process to prevent wrong, injustice or injury arising out of fraud, mistake or irregularity. *Ray v. Stobbs*, 28 Mo. 36; *Newman v. Early*, 28 Mo. 477; *Freeman on Ex.*, § 308; *Gordon v. Suns*, 2 McCord's Ch. 159; *Cummings' Appeal*, 23 Pa. St. 509. "The misconduct or mistakes of the sheriff should not be permitted to prejudice the rights of either party." *Downing v. Still*, 43 Mo. 319. The execution plaintiff has no interest in this suit, and should not have been notified. Nor was it necessary to notify the sheriff.

EWING, C.—This was a proceeding at the October term

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of the circuit court of Clinton county, to set aside a sale of real estate made by the sheriff at said term of court. The motion to set the sale aside was in words as follows:

“ And now comes Robison J. McKee and on his oath says that he is the owner of the following described real estate, situate in Clinton county, Missouri, to-wit: Lot No. 15, in block No. 39, in the town of Lathrop, in said county; that he purchased said property of Daniel H. Maret; that on the 17th of June, 1881, judgment was rendered against said property at the suit of John N. Payne, collector of Clinton county, Missouri, in this court, enforcing a lien for certain taxes due thereon; that said Daniel H. Maret was liable for said taxes to affiant on his covenants to affiant, and when the affiant was served with summons in said court he applied to said Maret to pay the same; that said Maret agreed and promised to do so, and as affiant is informed and believes did, by letter, instruct the collector to send the receipts to the Lathrop bank and there receive the amount due, which the collector was in the habit of doing, and did do as to the balance of said Maret's taxes, but by some oversight said tax was not so paid; that affiant supposing said taxes were paid, attended no further to said suit, and was in ignorance that the same was not paid or that judgment had been rendered therefor until he saw the sheriff's advertisement for the sale thereof on execution, issued upon said judgment, of which affiant immediately notified said Maret, who again promised and agreed to pay the amount of the judgment, and prevent a sale thereof under said execution; that, as the affiant is informed and believes, said Maret did, on the 11th day of October, 1881, visit the sheriff, and represented the facts to him, and offered to pay the amount of the judgment and all costs so as to avoid said sale; that the sheriff, M. S. Allgaier, not knowing at the time the exact amount thereof, and being at the time busily engaged with the duties of his office, assured said Maret that it would be all right, and that he would not sell said property, but would return said execu-

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tion satisfied, and settle with said Maret, who was and is a responsible man, at another and leisure time. Affiant further states that said Maret is a trustworthy and responsible man, and he relied upon his paying said judgment and supposed it was settled until Monday morning, the 17th inst., when he was informed that the property had been sold under said execution. Affiant states, by a mistake and oversight of the sheriff, he sold said property, not meaning nor intending so to do; that at such sale the same was stricken off to the said H. A. Logan and A. J. Orem; that if he had known the property would be sold he would have satisfied such judgment, and is now ready and willing to pay the same, and for that purpose has deposited in the hands of the sheriff the full amount of said judgment and all costs, to be so applied if said sale is set aside.

"Wherefore he prays the court to set aside said sale and order and direct the sheriff to return to said purchasers their money bid and paid at said sale for said property.

"R. J. McKEE.

"Subscribed and sworn to before me this October 19th, 1881.

D. H. LINDSAY, Clerk."

The following is the order of court setting aside sale:

"Now, at this day, come the parties herein, by their respective attorneys, and the motion to set aside sheriff's sale heretofore filed is taken up, considered by the court, and is by the court sustained and the sale is set aside, and the sheriff is ordered to pay back the purchase money to the purchaser; and it is ordered and adjudged by the court that the defendants pay all costs in this behalf expended, and that execution issue therefor."

The evidence tended to prove the averments of the motion. And the defendants appeal to this court.

I. The appellants insist that the circuit court erred in setting aside the sale, first: Because under the evidence and motion no sufficient grounds for such action were shown to the court; and secondly, because the plaintiff in the execution and the sheriff who made the sale were not

made parties to the proceedings and had no notice of its pendency.

This court has repeatedly held that it is the duty of courts to see that their process is not abused or perverted to the oppression of individuals; and if it appear at the return day that process has been executed in an illegal or oppressive way, summary redress will be afforded. *Ray v. Stobbs*, 28 Mo. 36. Courts exercise the power to vacate sales upon motion at the return day for many causes. "There is scarcely any fraud or irregularity either in the issuing, form or execution of a writ, which may not be made the occasion for a motion to vacate a sale." *Freeman on Ex.*, § 308. A sale may be vacated on account of the misconduct of the officer, or of the plaintiff, or of the defendant, or of the purchaser. And for accident, or mistake, or inadvertence, when shown to have operated injuriously upon the interests of the complainant. § 308, *supra*; *Neiman v. Early*, 28 Mo. 475; *Cummings' Appeal*, 23 Penn. St. 509; *Beach v. Dennis*, 47 Ala. 262.

II. In *Neiman v. Early*, 28 Mo. 475, Judge Napton, in delivering the opinion of the court, held that: "The court had power over the execution of its process until the officer returned it, and it is not believed to be the practice in such cases, or essential to the exercise of the power of the court that the bidders or purchasers should be notified. * * So long as the term lasts, the matter is in the power of the court to take such steps as under the circumstances may be thought just and prudent." But in the case at bar no such question arises as to the purchasers, because the record shows them to have appeared and defended and as here seeking a reversal of the judgment.

It remains, therefore, to consider the question of want of notice to the plaintiff in the execution, and to the sheriff or officer who made the sale. The better practice would seem to require notice to all the parties in interest. The plaintiff, the defendant and the purchaser are all interested and their rights would in no manner be affected by the pro-

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ceeding, unless they had their day in court. Freeman on Ex., § 306; 3 Ia. 241; 13 Ia. 461. When the officer who made the sale has no direct interest in its maintenance, it would seem notice to him is not necessary. Freeman on Ex., § 306 *supra*; *Beach v. Dennis*, 47 Ala. 262. But while the rights of parties who may be interested are in no wise affected unless they have notice, yet who can take advantage of it? Clearly not the purchaser when he resists the vacation of the sale. His interest in this case is to maintain the validity of the sale, and his rights are not interfered with by reason of want of notice to the plaintiff and the sheriff, and he has no right to complain.

Let the judgment be affirmed. All concurring.

BROWN, *Plaintiff in Error*, v. GIBSON.

Deed, Description in. Each part of the descriptive language in a deed is to be construed with relation to the other parts, and no inflexible rule of interpretation will be allowed to defeat its clear meaning.

Error to Jackson Circuit Court.—HON. F. M. BLACK, Judge.

AFFIRMED.

C. O. Tichenor for plaintiff in error.

In case of doubt as to the quantity conveyed by a deed, words of doubtful import are to be construed most favorably to the grantee. *Winslow v. Fatten*, 34 Me. 25; *Clemens v. Rannels*, 34 Mo. 584; *Nelson v. Brodback*, 44 Mo. 596. The rule is, that a line simply from one point to another, must be straight and must run in the shortest and most direct way. Washburn on Real Prop., § 43, side p. 632. What are the boundaries is a matter of law; (*Whit-*

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tesey v. Kellogg, 28 Mo. 404;) and a surveyor cannot testify to the legal interpretation to be given a survey. *Ormsby v. Ihson*, 10 Casey 462; *Blumenthal v. Roll*, 24 Mo. 113. The deed must give a sufficient description, and parol evidence cannot control it. *Orr v. How*, 55 Mo. 329; *Means v. La Vergne*, 50 Mo. 343; *King v. Fink*, 57 Mo. 209.

P. S. Brown pro se.

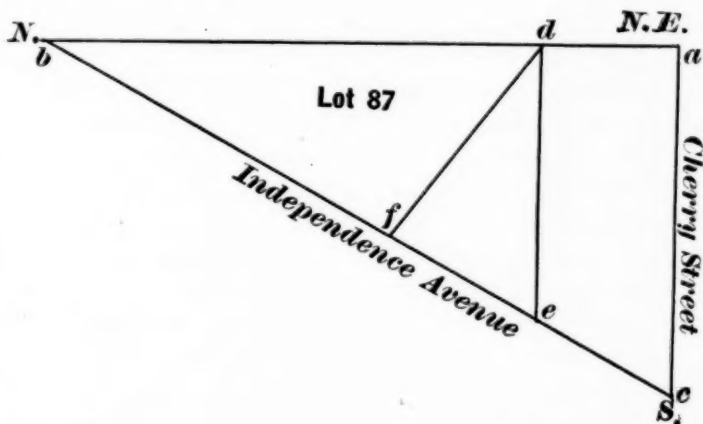
1. Where the statute prescribes the form of a tax deed the form becomes substance, and must be strictly pursued, or the deed will be void. *Grimm v. O'Connell*, 54 Cal. 522; *Lain v. Cook*, 15 Wis. 446; *Wakely v. Mohr*, 18 Wis. 321; *Williams v. McLanahan*, 67 Mo. 499; *Dunlap v. Henry*, 76 Mo. 106; *Larkin v. Wilson*, 28 Kas. 513; *Pack v. Crawford*, 29 Ark. 489; *Harrington v. City of Worcester*, 6 Allen 576; *Hubbard v. Johnson*, 9 Kas. 632. 2. Objections to a deed on the ground of being void where trial court's attention is thereby called directly to face of deed, is sufficient, without specifically pointing out each reason. *Larkin v. Wilson*, 28 Kas. 514; *McLaurine v. Monroe*, 30 Mo. 462. 3. The three years' limitation provided in section 66 of said article 6, Laws of 1875, page 239, does not apply to a deed void on its face. *Watterson v. Devoe*, 18 Kas. 223; *Sheehy v. Hinds*, 27 Minn. 259; *McGavock v. Pollock*, 13 Neb. 535.

C. A. Kenyon and J. W. Snyder for defendant in error.

1. All the descriptive parts of a deed are to be construed together, especially when so related as here. 4 Greenl. Cruise, 338 and note; *Thatcher v. Howland*, 2 Mete. 42; *Bosworth v. Sturtevant*, 2 Cush. 391; *Jamison v. Fopiano*, 48 Mo. 194; *Gibson v. Bogy*, 28 Mo. 478; *Evans v. Green*, 21 Mo. 170; *Krouenberger v. Hoffner*, 44 Mo. 185; *Bower v. Earl*, 18 Mich. 375; 2. The acts of the parties and the circumstances attending conveyance, and their subsequent conduct in reference thereto, may be resorted to to deter-

mine the location of a line to which the deed refers, when the description is ambiguous or uncertain. *Krouenberger v. Hoffner*, 44 Mo. 185; *Bower v. Earl*, 18 Mich. 367; *Jackson v. Vedder*, 2 Caines 210; *Schmitz v. Schmitz*, 19 Wis. 210; *Hall v. Davis*, 36 N. H. 573; *Foule v. Bigelow*, 10 Mass. 379; *Hoven v. Brown*, 7 Greenlf. 421; *Jackson v. Wood*, 13 John. 348; *Livingstone v. Ten Broek*, 16 John. 482; *Van Gorden v. Jackson*, 5 John. 14; *Safret v. Hartman*, 7 Jones (N. C.) L. 202.

HENRY, J.—Plaintiff sued in ejectment to recover the parcel of land embraced within the triangle def. of the following diagram :



The petition is in the usual form. The answer is a general denial. At the trial below there was judgment for defendant from which plaintiff has appealed.

The question for determination is, whether line *df.* or line *de.* is plaintiff's west line. Plaintiff's evidence consisted of a deed from Allen and wife to Margaret A. McNees for lot 87. A deed from Margaret McNees and her husband, dated April 5th, 1871, to James C. Medsker for a part of said lot 87, described as follows: "Commencing at the southeast corner of said lot and running thence on

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the east line of said lot to the northeast corner of said lot, thence west on the north line of said lot forty feet, thence south to the south line of said lot, thence east to the place of beginning." Plaintiff proved title in himself through mesne conveyances by like description, as in said deed to Medsker, except that the words "on the north line of said lot" are omitted. He also proved actual possession of the property in dispute in himself and those under whom he claims from 1868 to March, 1880, the date of defendant's entry.

D. O. Flaherty, county surveyor, testified that east line of said lot, 87, fronting on Cherry street, is fifty-seven and twenty-six one-hundredths feet, the north line one hundred and forty-two feet, and south line one hundred and forty-eight and nine-twelfths feet, that the east line from southeast corner runs north with variation from due north of seventeen degrees west, north line from northeast corner runs south seventy-three degrees west, and the south line runs due east and west, that beginning at a point on north line of said lot forty feet westward from northeast corner, and running thence a line due south to south line of said lot strikes a point on said south line fifty-four and ninety-one one-hundredths feet west from the southeast corner of said lot, that the above diagram made by him from actual survey shows the ground in controversy, being thirteen and ten one-hundredths feet on the south line and comes to a point on north line. That defendant's east line fence extends along the east line of the ground in controversy, the southeast corner of her inclosure being forty-one and eighty-four one-hundredths feet west from southeast corner of said lot. That a survey of the property in accordance with the description in said deed to Medsker, includes the property in controversy.

The court gave the following declaration of law:

If the court finds from the evidence, that the south line of said lot 87, is a due east and west line; that the east line of said lot is not a due north and south line, but runs

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to the west of such a line by a considerable variation; that the north line of said lot is not a due east and west line, but runs to the south of such a line by a like variation; that the east and north lines of said lot are at right angles to each other, then the west lines of the property described in the deed from McNees to Medsker, and in the deed of trust made by said Medsker should be taken to be a line with like variation and to be a line parallel to the east line of said lot 87, and they do not convey the triangle in question and, therefore, the finding must be for the defendant.

In the description of the land in McNees' deed to Medsker, the north line of lot 87 is treated as running east and west, while in fact it varied seventy-three degrees from a due east and west line. The last boundary line named in the description is one running east to the beginning. It is evident that the grantor and grantee both regarded the north line as running due east and west, and the south line as parallel to it. So run two of the lines in this view, and then exactly conform to the description in the deed in running the third line due south would do violence to the manifest intent of the grantors. The descriptive language of the deed is to be construed each part with relation to the other parts, and no inflexible rule of interpretation will be allowed to defeat its clear meaning. The east line from the southeast corner to the northeast corner varied seventeen degrees from a due north line. The north line from the northeast corner to the northwest corner varied seventy-three degrees from a due west line, although the call in the deed is for a line running west from the northeast corner, and yet when the plaintiff runs his south line he pays no regard to the variations of the other lines which he had observed, but runs a due north line, because the description in the deed called for a line running south.

We are all of opinion that the court below correctly construed the description in the deeds, in its declaration of law, and the judgment is affirmed.

Rinehart v. Bills.

RINEHART, Appellant, v. BILLS.

1. **Husband and Wife : ALIENATION OF WIFE'S AFFECTIONS, ACTION FOR.** An action lies in behalf of a husband for the alienation with malice or improper motives of his wife's affections. Neither debauchery nor enticing her away from him is necessary to a recovery in such action.
2. — : — : —. The alienation of a wife's affections for which the law gives redress, may be accomplished, notwithstanding her continued residence under his roof.
3. **Doubtful Claim, Compromise of : CONSIDERATION.** The compromise of a doubtful claim asserted in good faith, affords a valuable consideration to support a promise.

Appeal from Knox Circuit Court.—HON. B. E. TURNER,
Judge.

AFFIRMED

O. D. Jones for appellant.

There must be proof of defilement of the wife, or of having enticed her away to sustain the action. Mere solicitations are not sufficient. *Gilchrist v. Bale*, 8 Watts 355; *Bigelow's Lead. Cases on Torts*, p. 328; *Hutchinson v. Peck*, 5 John. 196; *Modisett v. McPike*, 74 Mo. 636. There was no cause of action to compromise, hence there was no consideration for the note. *Wade v. Simeon*, 2 C. B. 548; *Sav. B'k v. Concord*, 15 N. H. 119; *Long v. Towle*, 42 Mo. 545.

Dysart & Mitchell for respondent.

The plaintiff assumes that because the pleadings do not show that defendant's wife was debauched or enticed away he had no right of action against plaintiff, and hence the compromise note taken in settlement was without consideration and void. This is manifest error. "A husband has the right to sue, for damages, all persons who seek to entice her away with malice or improper motives." *Schouler's Domestic Relations*, p. 57, and cases cited. Also,

for the "loss of the wife's affections." Cooley on Torts, 224; *Hoard v. Peck*, 56 Barb. 202; *Heermance v. James*, 47 Barb. 120. The latter case is right in point. There was no crim. con. and no enticing away. Neither does it follow that if defendant had no right of action the note is without a sufficient consideration. The controversy between the parties was a sufficient consideration to support the promise. "The prevention of litigation is not only a sufficient but a highly favored consideration." 1 Parsons on Cont., (6 Ed.) § 4, p. 438; *O'Keeson v. Barclay*, 2 Pa. (Penrose & Watts) 531. This last case was a suit on a note given in settlement of a slander suit, in which the petition stated no cause of action whatever, but the note was held valid. And bonds issued under an unconstitutional statute are void, but bonds issued in payment thereof, made under a valid statute, are good. Admit, for argument's sake, that plaintiff's defense to defendant's demand for damages was ever so good, yet if he compromised and settled with defendant with a full knowledge of all the facts, in the absence of any fraud, then he is bound by the settlement. *Draper v. Ordsley*, 15 Mo. 613; *Livingston v. Dugan*, 20 Mo. 102; *Adams v. Sage*, 28 N. Y. 103; *Stover v. Mitchell*, 45 Ill. 214; *Steel v. White*, 2 Paige's Ch. 478.

MARTIN, C.—On the 26th day of January, 1880, the plaintiff filed a complaint in equity against the defendant. In this complaint another party was originally included as a defendant, but was discharged before trial. The object of the suit was to enjoin the transfer and collection of a certain promissory note in the sum of \$550 made by the plaintiff, to enforce its surrender and cancellation, and obtain a judgment for a part payment indorsed upon it. It is alleged in the petition that the note was without consideration, and was obtained by false representations, by threats of suit, and of personal violence. The defendant in his answer denied the allegations of the petition and recited the facts

constituting the consideration of the note, which in his own language read as follows :

“Defendant, further answering, says: That on or about the 11th day of November, 1879, he learned for the first time that plaintiff, for a long time thereto, to-wit, for about eighteen months, then last past, had been making love to his (defendant's) wife, whenever and wherever he could meet her. That he had plied every art and used every device in his power to win her love and esteem, and to alienate and estrange her from her husband. That he had told her at divers times and places, that he loved her deeply, devotedly, madly, and that he could not live without her. That plaintiff had written her love-letters on divers occasions; had given her a fine gold finger-ring, and desired to leave and abandon his own wife and children, and take defendant's wife and go to a new country where they would not be known, and could marry and live together as man and wife. That plaintiff was rich and would maintain her in luxury and ease, and she could live like a lady without labor and toil. Defendant, further answering, states that plaintiff, by his persistent efforts, finally succeeded in alienating and estranging the love and affections of defendant's wife from defendant, and procured in the manner and by the means aforesaid, her consent to leave and desert her husband and elope with plaintiff.”

The answer goes on to recite that she had relented her rash promise to elope with plaintiff, had confessed everything to her husband, and begged to remain with him as his wife under the security of pardon and forgiveness. It is further alleged in substance that the defendant, smarting under the wrongs inflicted upon him by plaintiff, repaired to the plaintiff's residence with his attorney, with a view of settling for these wrongs without suit; that in the interview the plaintiff admitted the facts as charged against him, and agreed to pay defendant in liquidation of all damages by him sustained, and in final settlement thereof, the sum of \$600; that he paid down \$50 and gave the note in con-

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troversy for the remaining \$550, payable four months from date; that he afterwards paid \$205 on account of the note, which payment was indorsed on the same. The answer concludes with a prayer that the injunction be dissolved and judgment be rendered in defendant's favor, in the amount of the note remaining unpaid, which is stated to be \$345 with interest.

The plaintiff interposed a demurrer to this answer, which was overruled. The case was then tried by the court without the intervention of a jury. The court found the issues in favor of defendant, declaring in its decree that the matters and allegations in plaintiff's petition are untrue and not sustained by the evidence. The injunction was dissolved and the sum of \$40.05 was assessed as damages on the injunction bond against the plaintiff and his sureties. It was, also, adjudged that defendant recover of plaintiff the balance due on the note sought to be enjoined. The bill of exceptions does not contain the evidence, but merely recites that evidence was submitted by both parties tending to prove the allegations of their pleadings.

Only one question is presented to us, in the record, for determination. That question involves the sufficiency of the defense, and is raised on the demurrer and in the motions made after judgment. The plaintiff contends that as the answer fails to show that defendant's wife had been actually debauched or seduced away from him, no wrong had been inflicted upon him, for which an action lies; and that the note taken in settlement of the supposed wrong was void as being without consideration. This position cannot be maintained upon either principle or authority. The injury to defendant consists in the alienation of his wife's affections with malice or improper motives. Debauchery and elopement when they occur are only the immediate and legitimate consequences of the wrong. That the injury in this instance did not culminate in adultery and elopement is a fact not due to the plaintiff's forbearance, but to the wife's prudent reflection and laudable re-

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pentance. The alienation of the wife's affections for which the law gives redress, may be accomplished notwithstanding her continued residence under her husband's roof. Indeed it has been not unfrequently remarked by authors and jurists, that such continued residence after the alienation has been effected, so far from leaving the husband without a good cause of action, contributes an aggravation to his injury, from which an elopement might well be accepted in the nature of an alleviation. Schouler's Dom. Rel., 57; Cooley on Torts, 224; *Hoard v. Peck*, 56 Barb. 202; *Heermance v. James*, 47 Barb. 120.

I think it would be difficult to regard it in any other light in the absence of contrition or change of heart. The demurrer admits the salacious and seductive solicitations of the plaintiff, extending over a period of eighteen months. It, also, admits the fact of actual estrangement and alienation which constitutes the essence of the offense. Everything which follows afterwards, can be only in the nature of aggravation, mitigation or reparation of the wrong inflicted upon the sanctity of the defendant's home.

I may add here by way of allusion to the consideration of the note, that the compromise of a doubtful claim asserted in good faith, furnishes a valuable consideration to support a promise. 1 Par. Cont., 438, § 4 (6 Ed.).

The judgment is affirmed. All concur.

THOMAS V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
Appellant.

1. **Railroads: KILLING STOCK: DOUBLE DAMAGES: STATEMENT.** A statement in an action against a railroad company for double damages for killing stock, is sufficient in that regard, if it states facts which necessarily imply that the failure to fence caused the injury complained of.
2. ———: ———: ———. A tenant whose horse was killed by reason

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of the failure of the railroad company to fence, in the absence of notice thereof, will not be bound by an agreement between his landlord and the railroad company relieving the latter of its duty to fence in the former's field, and agreeing that the landlord should make no claim for stock killed therein.

Appeal from Clinton Circuit Court.—HON. GEO. W. DUNN,
Judge.

AFFIRMED.

George W. Easley for appellant.

(1) The statement does not state facts sufficient to constitute a cause of action. *Luckie v. Railroad Co.*, 67 Mo. 245; *Sloan v. Railroad Co.*, 74 Mo. 48; *Bates v. Railroad Co.*, 74 Mo. 60; *Johnson v. Railroad Co.*, 76 Mo. 553. (2) The statute required the fence, so far as this case is concerned, for the benefit of King, the adjoining owner. *Berry v. Railroad Co.*, 65 Mo. 172; *Harrington v. Railroad Co.*, 71 Mo. 384; *McDonnell v. Railroad Co.*, 115 Mass. 564. King, the owner, having contracted with the defendant relieving it from its liability for stock killed in his field for want of a fence, the plaintiff, his tenant, cannot recover. *Pierce on Railroads*, p. 423.

J. M. Lowe for respondent.

EWING, C.—This was a suit under the double damage clause for killing stock upon the following statement:

“Plaintiff, O. W. Thomas, states that the Hannibal and St. Joseph Railroad Company is a corporation, made so by the laws of the State of Missouri, and as such can sue and be sued, that said company own or operate a railroad running through Jackson township, Clinton county, Missouri. That the said railroad runs through the farm of Austin R. King, on the south edge of Clinton county, in Jackson township, and that through said farm the said company have not their road fenced as the law directs.

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Plaintiff states that he has said farm rented and under his control, and that previous to and on the 14th day of April, 1881, he had been and was pasturing his horses on the said farm. That on the morning of the 14th day of April, 1881, one of plaintiff's horses went upon the track of said railroad at the point on said road described above, where the said road is not fenced so as to prevent stock from their track, the point being a few yards north of the south line of Clinton county, in Jackson township, Mo., and that the west bound passenger train, about 7 o'clock, on the morning of the 14th day of April, said train being operated by the employes of the said Hannibal & St. Joseph Railroad Company, struck said horse, throwing him from the track and so maiming and crippling the horse that the section foreman on that line of road killed the horse and removed the body. Plaintiff states that disinterested parties valued the said animal at \$120; this amount plaintiff demanded of said company, which they refused. Now as the said company continually refuses to pay the real value of said horse, which was a bay horse, about eight years old and a good work animal, plaintiff prays a judgment against said defendant for the sum of \$240 and his costs as double the amount of the appraised value of said horse."

There was a judgment against the defendant before the justice and before the circuit court whence the case comes here by appeal.

I. The first point made by the appellant is, that the statement before the justice was not sufficient to constitute a cause of action, in that it fails to state that the horse was killed by reason of the failure to fence the road. The complaint states that the defendant's road ran through his farm where it had not fenced its road as the law directs; that plaintiff's horses went upon said road "at the point on said road described above, where the road is not fenced so as to prevent stock from their track, the point being a few yards north of the south line of Clinton county, in Jackson township, Missouri, and that on the 14th of April, the west

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bound train struck said horse," etc. We think the implication here is irresistible, that the failure to fence caused the injury complained of, and the statement must be held sufficient, especially after verdict. *Terry v. Mo. Pac. R'y Co.*, 77 Mo. 254, and cases there cited.

II. The second instruction asked by the defendant and refused, was as follows:

2. If Austin R. King was the owner of the field in proof and had entered into an agreement with an agent of defendant, that in consideration that defendant would not fence its right of way through said field, and would allow said King to cultivate the same, he King, would make no claim for damages for stock of his killed in consequence of the failure to fence its track through said field, and further believe that plaintiff had rented said field of said King and was at the time of the accident sued for cultivating the same, then the finding must be for defendant.

The evidence introduced by the plaintiff tended to show that the animal was killed inside the field of Austin R. King, where the railroad was not fenced; that the plaintiff rented the farm of King, and that there was an agreement between King and the defendant "that if the defendant would not fence its road where it passed through his field but would leave it open, and would allow him (King) to cultivate defendant's right of way, which is about fifty feet on each side of the track, up to the track itself, that he would never make any claim on defendant for such of his stock as might be killed on the railroad in his field. King always cultivated the land along the road up to the end of the ties and plaintiff did the same for the time he had it, and that Thomas, the tenant and plaintiff, had no knowledge of his agreement until after his horse was killed. The duty to maintain fences imposed by statute for the benefit of the adjoining land-owner may be waived by him. *Pierce on Railroads*, 422, 423; *I. P. & C. R. R. Co. v. Petty*, 25 Ind. 413; *Prest. etc., T. H. & R. R. R. Co. v. Smith*, 16 Ind. 102. And these authorities, also, maintain the doctrine that a ten-

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ant with notice could not recover in such cases, when his landlord was estopped by his contract of waiver. *C. H. & D. R. R. Co. v. Waterson*, 4 Ohio St. 424, 434. So where a covenant to maintain fences runs with the land and is duly recorded, it binds all parties. *Duffy v. N. Y. & H. R. R. Co.*, 2 Hilt. 496; and authorities there cited. But parol agreements for the removal and discontinuance of a fence on the line of a railroad between the owner of the land and the railroad company does not run with the land, and cannot bind the grantee. *Wilder v. M. C. R. R. Co.*, 65 Me. 332; *Gilman v. E. & N. A. Ry Co.*, 60 Me. 235; *St. L., A. & T. H. R. R. Co. v. Todd*, 36 Ill. 409.

It would seem, therefore, that a tenant of a land-owner who had made such contract with a railroad would not be bound thereby, unless he had notice of the existence thereof. 4 Ohio State, *supra*. In this case the evidence tends to show that the plaintiff had no knowledge of the contract as to the fence between his landlord, King, and the railroad company, until after his horse was killed and the instruction was therefore, properly refused. The judgment of the court below is affirmed. All concur.

THE STATE *ex rel.* CRANE *et al.* v. HEINRICHS *et al.*, Appellants.

1. **Executor: REVOCATION OF LETTERS: BOND.** An executor, who resigns or is displaced, and is permitted by the court to make final settlement and take the receipt of his successor and go out of court, is not liable to an action on his bond by a creditor for the latter's allowance against the estate, and such is the case although the court may have ordered the executor, while in office and when he had funds of the estate in his hands, to pay all demands against the estate and he failed to do so.
2. ———: ———. The funds of the estate in the hands of the executor at the time of his displacement, are debts due the estate, and can, under the statute, be paid by him only to his successor in office.

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Appeal from Cole Circuit Court.—HON. E. L. EDWARDS,
Judge.

REVERSED.

Hamilton & Fisher for appellants.

The plaintiffs could not maintain their action against the former executor and his securities; they should have proceeded against the administrator in charge of the estate. R. S., §§ 48, 49; *State v. Hunter*, 15 Mo. 338; *Scott v. Crews*, 72 Mo. 261. When an administrator resigns, it is his duty to pay over all funds of the estate in his hands to his successor; the former has no authority to make distribution after his office ceases. *Connelly's Appeal*, 1 Grant (Pa.) 366; *Lane v. State*, 27 Ind. 108. The petition is defective in failing to allege that the executor had in his hands sufficient funds of the estate to pay all the demands against the estate. The general order to pay, not having been made upon any settlement, and failing to specify the class of demands to be paid was void. *Renick v. Hubbard*, 19 Pick. 167. The discharge of the executor upon payment to his successor of all moneys, and his transfer of all property in his hands belonging to the estate, was a discharge of the securities on the executor's bond.

White, Edwards & Davison for respondents.

The court properly sustained the demurrer to the answer of defendants. The judgment requiring him to pay all the debts, was binding upon him, and he could not avoid it by attempting to show that he was prevented from complying with the order by another judgment entered more than a year afterwards. The judgment was final. If erroneous, it should have been appealed from—cannot be attacked in a collateral proceeding. *Freeland v. Wilson*, 18 Mo. 380; *State ex rel. Shun v. Stafford*, 73 Mo. 658; *State*

to use of *Griffith v. Holt*, 27 Mo. 340; *Taylor v. Hunt*, 34 Mo. 205; *Dix v. Morris*, 66 Mo. 514; *State ex rel. Rucker v. Rucker*, 59 Mo. 17; *State ex rel. Wolf v. Berning*, 74 Mo. 87. The statute provides the manner in which the letters of an executor may be revoked. It is necessary to a legal revocation that the court having jurisdiction should make some kind of an order. R. S. 1879, §§ 43, 44; *State ex rel. Rucker v. Rucker*, 59 Mo. 17. The point made by the respondent of the insufficiency of the petition is not well taken. *State ex rel. Cowan v. Modrell*, 15 Mo. 421; *State to use of Renfro v. Frice*, 15 Mo. 375; *State ex rel. Philips v. Rush*, 77 Mo. 586; *State to use of Keeley v. Thornton*, 56 Mo. 325.

PHILIPS, C.—The defendant, Heinrichs, qualified and acted as the executor of the last will and testament of Agnes Heinrichs, deceased, in Cole county. He gave bond as such on the 6th day of November, 1874. The petition in this case alleges, after the usual preliminary averments, that, on the 11th day of November, 1875, the plaintiffs proved up an account against said estate for the sum of \$781.77, which the probate court then allowed and placed in the fifth class. This suit is brought by plaintiffs against said Heinrichs and the sureties on his official bond to recover the amount of said allowance. The breach assigned is, that the court of probate aforesaid at its October term, 1876, ordered said executor to pay immediately all demands against said estate, “and although plaintiffs at that time held and do still hold their demands against said estate, the said Heinrichs, as such executor, has failed to pay the same or any part thereof, although requested so to do.”

The answer, after tendering the general issue, except, etc., admitted that the court made the order recited in the petition and then averred that said Heinrichs had complied therewith until he was prevented from further compliance by the subsequent action of the county court, on the 17th day of November, 1877, when he was relieved and discharged from further administering on said estate at

which time Tennessee Mathews was, by the order of said court, duly appointed administrator *de bonis non*, with the will annexed, of said estate. It then averred that on the day last aforesaid, and before the demand aforesaid of plaintiffs was presented to him, the said Heinrichs made his final settlement of said estate, and did account, pay over and transfer to his said successor all moneys, properties and effects remaining in his hands or under his control, belonging to the estate, as he was by law and the order of the court required to do; since which time the said Heinrichs, it is alleged, had no right to pay claims of plaintiff against said estate, but the duty devolved upon his successor in office, etc. To all that part of the answer, after the general denial, the plaintiff demurred, which demurrer the court sustained, and that portion of the answer was stricken out.

The order of the probate court, relied on by plaintiffs, was made on the 2nd day of May, 1877, instead of October, 1876, as alleged in the petition, and is as follows:

"Ordered by the court, that John F. Heinrichs, executor of the said estate pay immediately all demands against said estate."

The plaintiffs evidence showed that the administrator *de bonis non* had, since his appointment, paid on plaintiffs' claim the sum of \$250, December 11th, 1881. The defendants offered to make proof, substantially, of the facts set up in the answer, which, on the objection of plaintiffs, the court excluded as incompetent and constituting no defense to the action. Defendants, also, offered in evidence the receipt of said Tennessee Mathews, administrator as aforesaid, to said Heinrichs, acknowledging the receipt from him of all the moneys, effects, etc., shown to be in the hands of the intestate by his last settlement. This the court also excluded. Defendants then introduced said Heinrichs as a witness, by whom they attempted to prove that the order for the payment of all claims, purporting to have been made on him by the county court, was made without

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any notice to him or knowledge thereof, also, that the estate was insolvent, and that he complied with the order as far as he could until displaced by the appointment of his successor; all of which the court excluded.

The court found the issues for the plaintiffs, and rendered judgment against defendants for the balance due on said claim.

Defendants bring the case here on appeal.

The principal question presented by this record is the right of the creditor plaintiffs to maintain this action against the former executor after his displacement by the appointment of his successor and his settlement with such successor. It is the manifest design and scheme of the administration law that the assets of the estate should all the while be in the hands of the acting executor or administrator, so as to be subject, in the manner designated by the statute, to the jurisdiction and supervision of the probate court. To this end it is provided by sections 48 and 49, Revised Statutes, that: "If any executor or administrator die, resign, or his letters be revoked, he or his legal representatives shall account for, pay and deliver to his successor, * * all money, real and personal property of every kind, and all rights, credits, deeds, evidences of debt, and such papers of every kind of the deceased, at such times and such manner as the court shall order, on final settlement with such executor, or his legal representatives to be made on motion of his successor * *."

"If the executor or administrator resigns, * * it shall be the duty of his successor * * to move the court to compel the executor, * * having resigned, to make final settlement; and on such motion, after due notice to such executor, * * the court having jurisdiction shall ascertain the amount of money * * unaccounted for at the time of his resignation * * and to enforce such order and judgment against such administrator or executor and his sureties, if they had due notice of the proceeding * *."

The language of these sections, and succeeding sections is quite explicit and comprehensive, and is such as to leave little doubt as to the legislative intent. When the administrator or executor ceases to be such, from death, resignation or revocation of his letters, he or his legal representatives shall account for, pay and deliver to his successor all money, real and personal property of every kind, etc. And the probate court shall ascertain the amount of money due, etc., at the time of his resignation, and compel him to pay over to his successor whatever remains in his hands as such administrator or executor. And if he does not so pay, he and his bondsmen are liable to the summary mode pointed out by the statute, or to a suit at the relation of the administrator *de bonis non*, on his bond. The order of the probate court for the payment of demands against the estate, conceding its legal efficacy, did not in any wise change the character of the funds assumed to be in the hands of Heinrichs as executor. It did not have the effect to segregate the fund from the general assets of the estate, or to set it apart so as to give the creditors any lien upon it. Until paid over by the executor it remained in his hand as the money of the estate. As such they were at all times subject to the control of the probate court. So much so is this true, that the court might, at any time prior to the execution of the order by the executor, have otherwise directed him and withheld the fund to some other time. The money not having been disbursed by Heinrichs at the time of the appointment of his successor, it was "money due the estate at the time of his resignation;" and as such he was bound by the express terms of the statute to pay it over to his successor. He had no right after he ceased to be executor to perform any act as executor. The order upon him was as executor. If valid, the order could be performed and executed by his successor. The payment, was to be made out of the assets in Heinrichs' hands as executor. His successor would discharge it out of the

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same fund, which Heinrichs should turn over to him on settlement.

The fact of such disbursement and when made, should be reported by the executor to the probate court for supervision and approval before he could take credit therefor. If the position of plaintiff in this action is maintainable, how is the amount claimed by the executor to have been disbursed under such order to be inspected and approved as it should be by the probate court? At the time Heinrichs was displaced by the appointment of Mathews he had not complied with the order. He is permitted by the court to make final settlement, and take the receipt of his successor and go out of court. After that the probate court lost jurisdiction over him as such executor. He is no longer in court. *Caldwell v. Lockridge*, 9 Mo. 362. Judge Scott said, in the course of his opinion in this case: "A court would not permit an executor or administrator to resign who was in arrears to an estate, until the balance against him had been settled. He would not thus be permitted to escape the control of the court in coercing the payment of the debts he may owe the estate." According to plaintiffs' theory, when Heinrichs made his settlement with his successor he should have withheld from him all funds necessary to discharge all the demands against the estate in existence at the date of the order in question; and as a matter of course he could pay them off after he had ceased to be executor. If so, how could the court of probate ascertain and pass on the amounts thus claimed to have been so disbursed by the executor? The court has lost its jurisdiction over him, and is without power to call him before it to exhibit his accounts. It thus becomes apparent that the remedy against the outgoing administrator or executor is placed in the hands of his successor. He can compel him under summary process as pointed out by statute, to make settlement and account for all the undisposed of assets; or he may bring action on his bond with or without settlement, for failure to account. *State ex rel. v.*

Porter et al., 9 Mo. 352. And the creditors must look to the administrator *de bonis non* to do his duty in this respect.

This question, we think, has been fully determined in repeated decisions of this court. *State ex rel. v. Hunter*, 15 Mo. 490, was an action by the administrator *de bonis non* against the former administrator on his bond, alleging the receipt by him of a large sum of money as assets of the estate which he had failed to account for. A demurrer to this declaration was interposed and sustained. Scott, J., who delivered the opinion, said: "The view of the court below, that an administrator *de bonis non* could not sue on the bond of a former administrator, was clearly erroneous. When there are debts to pay, he would seem to be the only person that could sue." In *State ex rel. v. Fulton*, 35 Mo. 323, the first administratrix on settlement in the probate court was ordered to pay the balance in her hands to her successor. Seven years having elapsed, without the first administratrix complying with this order, the distributees at law of the estate brought suit against her, alleging her failure to pay, that there were no debts of the estate unpaid, and that the fund of right belonged to them. The court say: "The administratrix * * * having made a settlement * * * and having been ordered by the court to pay the balance in her hands to her successor, the administrator *de bonis non*, she and her sureties were liable to that successor, and not to the plaintiffs or other person interested in the estate. The remedy of the plaintiffs is against the administrator *de bonis non*." The question came again before this court in *State ex rel. v. Dulle*, 45 Mo. 269. Bruns the first administrator died, after making an annual settlement, showing a considerable amount of assets in his hands liable to the claims of creditors. Letters of administration *de bonis non* were granted to one Chrisby, but the assets held by Bruns were not paid over to him, as Heinrichs claims he had done in this instance. Some of the creditors of the estate sued on the bond of the first administrator and recovered judgment. This court reversed the

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judgment. It is true there was no order made on Bruns in his lifetime to pay these creditors. But we think the real basis of this decision applicable to the case at bar. Wagner, J., *inter alia*, said: "It will be perceived that the statute contemplates that the succeeding administrator shall stand in the exact attitude of his predecessor, that he should perform the same duties and incur the same liabilities—that is, that he shall reduce the assets belonging to the estate to possession, and make distribution when legally authorized so to do. * * When an administrator dies or resigns, or his letters are revoked, his successor in office, the administrator *de bonis non*, is the proper person to sue for, recover and take charge of all the assets, of whatever description, belonging to the estate; he is thenceforth accountable, and it is to him that the creditors must look. Any other course would lead to confusion and destroy and practically annul the statutory provisions concerning priorities and classification."

It is probable that what is said in this opinion about a recovery by a creditor, in this form of action, producing inequalities in distribution, might have little weight in a case where the court had ascertained that there are assets sufficient to pay all the demands. But the suggestions made in the preceding part of this opinion touching the policy and necessity of the probate court ultimately passing on the disbursements when made, even under the order, would render the reasoning of Judge Wagner quite applicable to this case. And it is noticeable that he concludes his opinion by approving the language of Scott and Bates, JJ., in the cases *supra*: "That where the administrator dies, or is removed before final settlement, the administrator *de bonis non* can alone sue for the assets unadministered." This enunciation is repeated in *Kerrin v. Robertson*, 49 Mo. 252: "The administrator *de bonis non*, and not the creditors, is the proper person to pursue the estate."

And in *Scott v. Crews*, 72 Mo. 261, Norton, J., very distinctly asserts the doctrine that the assets of the estate

remain in the hands of the acting administrator or executor at all times to the end of the administration, subject to the supervision and final order of the court. He says: "It is clear from these various statutory provisions that, upon the revocation of the letters of an administrator, the county court is clothed with the power to have a settlement made in that court by the removed administrator. It is also clear that such a settlement is to be made at the instance of the successor, * * * and it is also clear that the county court is invested with authority to appoint such successor. * * * While an administrator holds the assets of an estate primarily for the payment of debts, the further duty is imposed upon him, after the debts are extinguished by payment, of paying to the heirs and distributees, under the direction of the court, what may remain in his hands applicable to that purpose. His full duty is not performed until both these things are done. * * * When such an administrator (*de bonis non*) was appointed, it is made the duty of the former administrator to pay over to him whatever remains in his hands, whether the estate is indebted or not."

In *Connelly's Appeal*, 1 Grant's Cases, 368, that distinguished jurist, Black, C. J., says: "It is well settled that a discharged executor or administrator is not to make distribution, but simply to pay over the fund to his successor." He cites the case of *Little v. Walton*, 11 Harris 164, which is much in point. In that case a balance had been found by the proper court to be in the hands of the administrator for distribution. He died without making such payment. The widow sued the administrator of the estate of the first administrator of her husband for her distributive share, who pleaded in defense that he had paid the fund over to the administrator *de bonis non*. This same learned judge said, after referring to the local statute, much like our own in this respect: "It was intended to keep the administration in one line and not compel the representative of a deceased administrator to make distribution of one part

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among the heirs and creditors of the original decedent, while the administrator *de bonis non* was doing the same thing with another part of the same estate."

II. Counsel have discussed, at length, the question of the validity of the order made by the county court to pay all demands against the estate. It is contended that it does not show that Heinrichs was in court when it was made, or that he made any settlement showing assets in his hands, nor does it appear from the order that the demands against the estate had ever been allowed. Whether the existence of the preliminary facts authorizing the county court to make the order, are to be presumed, in favor of its action, to have been found by the court, or whether the order is not, nevertheless, void on its face for not directing the executor to pay demands allowed against the estate only, instead of all demands, are serious questions. But in view of the conclusion already reached in the foregoing opinion, the determination of the validity of this order is not material.

It follows that the judgment of the circuit court is reversed and the cause remanded. All concur.

PEAKE *et al.*, Appellants, v. JAMISON, Trustee.

1. **Trustee: JUDGMENT: RES JUDICATA.** A judgment of a court of competent jurisdiction, settling the accounts of a trustee and discharging him from the trust, becomes *res judicata*, and is not subject to collateral attack.
2. **Trustee, Liability of.** A trustee is not chargeable with delinquency in failing to institute suit against a prior trustee for loss to the estate, resulting from the non-payment of taxes by the latter, when both he and his surety were insolvent at the time the defendant first learned of the neglect to pay the taxes.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Henry H. Denison for appellants.

(1) Appellants are beneficiaries under the will of their grandfather and take by purchase and not by inheritance, and consequently they are the proper parties to bring this action and can maintain the same. *Upwell v. Halsey*, 1 P. Williams 651; *Wright v. Miller*, 8 N. Y. 9; *Smith v. Bell*, 6 Pet. 68; *Peake v. Johnson*, 6 Mo. App. 589. (2) The respondent, the present trustee, has been derelict in his duty, in that he has not brought suits upon the bonds of his predecessors in the trust to recover certain sums of money lost to the estate by their gross mismanagement in allowing large sums in taxes, interest and penalties, and costs to accumulate against the estate for several years before paying the same. *Burr v. McEwen*, Bald. C. C. 154; *Caffey v. Darby*, 6 Ves. Jr. 488; *Powell v. Evans*, 5 Ves. 839; *Cocker v. Quayle*, 1 R. & M. 535; 2 Perry on Trusts, § 847. The respondent has not well pleaded the several settlements alleged to have been made with the court. A party cannot traverse and at the same time confess and avoid the same allegations. *Cable v. McDonald*, 33 Mo. 368; *Adams v. Trigg*, 37 Mo. 141; *Fugate v. Pierce*, 49 Mo. 441. The settlements alleged in the answer are not judgments. A trustee's accounts and settlements, if fraudulent or erroneous, are always subject to review in a court of equity. *Clarke v. Devaraux*, 1 S. C. 172; *Jones v. Dougherty*, 10 Ga. 273; *Shibla v. Ely*, 6 N. J. Eq. 181; 22 Tex. 691. (3) The trustee charged in his account, with the circuit court, against the estate, the sum of \$1,500 for legal services alleged to have been performed by the law firm of which the respondent himself was and is a member. This charge is illegal and improper, the trustee having charged in addition his commissions growing out of the same matter. "This rule is so strict that it has been held that if the trustee has a partner and employs such partner, no charge can be made by the firm." *Gamble v. Gibson*, 59 Mo. 585. *Vide*

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also, *Collins v. Carey*, 2 Beav. 128; *Cristophers v. White*, 10 Beav. 523; *Lincoln v. Winson*, 9 Hare 158; *Manson v. Bailie*, Scotch Ap. Reps. House of Lords, 1 Paterson, 562. The evidence as to the written contract whereby defendant was to be allowed attorney's fees, etc., alleged to have been mislaid was improperly admitted. *Johnson v. Matthews*, 5 Kas. 118. Parol proof of the contents of a paper should not be admitted, although its loss is accounted for, unless its execution is proved. *Embry v. Millar*, 1 A. K. Marsh. (Ky.) 300; *Kimball v. Moore*, 4 Me. 368.

Cline, Jamison & Day for respondent.

(1) The appellants claim, as heirs or distributees of Elizabeth C. Peake and L. Hardage Lane; the only way they can acquire title to personal property is through the administrator or executor; hence, plaintiffs cannot recover. *Hastings v. Myers*, 21 Mo. 519; *Hanenkamp v. Borgmier*, 32 Mo. 569; *Beattie v. Abercrombie*, 18 Alabama 9; *Becker v. Buckingham*, 18 Conn. 120. (2) There was no evidence showing or tending to show that defendant misapplied, or converted to his own use any money belonging to the estate of Hardage Lane, or was guilty of negligence, or of mismanagement or breach of trust, or that Gantt & Soulard or Cook acted willfully, negligently or unlawfully in allowing taxes to become delinquent, as stated in the amended petition. A trustee is liable only for want of due care and skill. *Merritt v. Merritt*, 62 Mo. 150. (3) The judgment in favor of Gantt & Soulard was a final one in their favor. (4) When respondent learned that the taxes for 1860 had not been paid by Cook, the latter and his surety were both insolvent. (5) The charge of \$1,500 for legal services was legal, and as such was approved by the circuit court in respondent's settlement.

HENRY, J.—In its opinion delivered in this cause, the court of appeals correctly states the case as follows: "Hard-

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age Lane died in 1849, leaving a will whereby he devised all his estate, real and personal, to Henry G. Soulard and Thomas T. Gantt in trust for the benefit of his two children, under certain limitations and restrictions. In 1860, Soulard and Gantt surrendered their trust and William M. Cook was appointed their successor. In 1863, Cook was removed from the trusteeship and the defendant appointed in his stead. This suit is founded upon charges that the trustees, Soulard and Gantt, had willfully and unlawfully allowed certain delinquent tax bills to accrue and accumulate upon lands belonging to the trust estate, and that Cook had been guilty of like mismanagement so that losses accrued to the estate amounting to \$3,783.88 together with other sums in interest, costs and expenses, all of which could have been recovered by the defendant against his predecessors and their sureties, but that defendant never demanded, sued for, or recovered the same as he ought to have done, so that by reason of his willful neglect in that regard he had been guilty of a breach of his said trust and became liable to plaintiffs as surviving beneficiaries to pay said losses. It is also charged that in his annual settlement for the year 1871 defendant charged and was allowed \$1,500 for attorneys' fees paid in and about certain litigation in which the estate was interested for services rendered by the partnership firm whereof defendant was a member in addition to commissions charged and received by him on account of the matter involved in the same proceedings. The petition prays that defendant be compelled to account for and pay over to the use of plaintiffs the said several sums of money, that his settlement heretofore made be set aside, that his accounts be referred to a master for examination and report, and that defendant be removed from the trust."

In addition to that statement it may be added that defendant, in his answer, alleged that at the October term, 1857, of the St. Louis land court, Gantt and Soulard instituted a suit against L. Hardage Lane and Elizabeth C. Peake and her husband Samuel H. Peake, for the purpose of being

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discharged from said trust and that said defendants appeared and filed their answer in said cause which was tried in said court on the 25th of June, 1858, and a decree rendered requiring said trustees to file in said court a full, true and perfect account of their trusteeship with vouchers thereof and on the 19th day of January, 1860, there was a change of venue in said cause to the St. Louis circuit court and on the 30th of April 1860, the trustees filed in said court a full, true and perfect account of their trusteeship with vouchers and the court found that there was then due to said trustees \$2,019.40 and rendered a decree that said account stand firm and effectual for ever between said parties, that said trustees recover of said defendants said sum of \$2,019.40, and that Gantt and Soulard be discharged and released as trustees and Cook appointed in their stead. The answer further alleged that said Hardage Lane and Elizabeth Peake and her husband instituted a suit in the St. Louis circuit court against William Cook in September, 1862, to have him removed as trustee and that pending said suit, it was agreed between this defendant and the plaintiffs in said suit, in writing, that if this defendant would serve as trustee he should be allowed six per cent commission on all sums of money which should pass through his hands, clear and free of all expenses such as commissions for collecting rents, selling real estate and attorneys' fees. That under that agreement the circuit court appointed this defendant trustee. That said written agreement has been lost or misplaced and cannot be found, that the services for which said attorneys' fee was charged were rendered in a suit to recover a tract of land belonging to said estate and that after a long and persistent litigation defendant recovered said land and realized from it for the estate \$14,254.70.

It was agreed that the statements in defendant's answer were true, except the allegation of the contract for fees and the execution of said paper alleged to be lost. On a hearing of the cause there was a finding for defendant and plaintiffs' bill was dismissed. On appeal to the court

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of appeals this judgment was affirmed, and appellants have appealed to this court. The plaintiffs are the heirs at law of L. Hardage Lane and his sister Elizabeth Peake who were the sole heirs of Hardage Lane. L. Hardage Lane died leaving no issue and the plaintiffs are the children of his sister, Mrs. Peake, who departed this life before the institution of this suit.

So far as the alleged misconduct of Gantt and Soulard is concerned the judgment of the St. Louis land court in the suit of Gantt and Soulard against L. Hardage Lane and Mrs. Peake and her husband precludes any inquiry into that matter. That court had jurisdiction of the parties and of the subject matter of the litigation. All the parties interested were before the court and a settlement was required by the trustees in that proceeding and it was made and passed upon by the court, and yet after the lapse of twenty years these plaintiffs seek to go behind that judgment to investigate alleged misconduct of these trustees resulting in a loss to the estate. The matter was *res adjudicata*. If any misconduct on the part of Gantt and Soulard had occurred that was the time and the occasion to investigate it. Their liabilities to the estate on account of their trusteeship was the very subject under investigation. This defendant could not have gone behind that judgment to charge Gantt and Soulard for moneys lost to the estate by their negligence which occurred, if at all, before that judgment was rendered.

With regard to the alleged misconduct of Cook it is sufficient to say that the evidence proved that when defendant learned that the taxes on the land for the year 1860 had not been paid by Cook, Cook and his security Henry Von Phul were both insolvent and a suit against them would have been unavailing.

The only remaining question which we deem it necessary to notice relates to the charges of \$1,500 as attorneys' fees. It was alleged in the answer that it was agreed by L. Hardage Lane and his sister and her husband with this de-

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fendant that if he would accept the trust in addition to his commission he should have extra pay for any services as attorney. Defendant testifies positively to the execution and substance of the agreement and the only witness on the other side was Samuel H. Peake, father of plaintiff, who testified that he had no recollection of signing such a paper. That he was out of the State at its date. In corroboration of defendant's testimony in October, 1871, he filed a settlement as trustee in the circuit court of St. Louis in the case of said L. H. Lane and Samuel H. and Elizabeth Peake against William Cook in which the said \$1,500 attorneys' fees were credited and allowed by that court. We have not noticed other questions discussed by the court of appeals in its opinion and in briefs of counsel because we do not think it necessary to a decision of this cause.

The judgment is affirmed. All concur.

THE STATE V. MYERS, *Appellant*.

1. **Pleading, Criminal:** INDICTMENT: FRAUD; OWNERSHIP: VARIANCE. An indictment under Revised Statutes, section 1561, for obtaining property by means of a trick and fraud, should charge it to belong to the true owner. But a variance in this particular upon the trial will not, under the statute, (R. S., § 1820,) be fatal, unless the trial court shall find it to be material to the merits of the case, or prejudicial to the defense of the defendant.
2. **Practice, Criminal:** EVIDENCE: INTENT. In a prosecution under Revised Statutes, section 1561, for obtaining property by means of a trick and fraud, acts of the defendant similar to the one for which he is being tried, committed on the same day and in the same town, are admissible against him for the purpose of showing the intent with which the act was done.

Appeal from Jasper Circuit Court.—HON. M. G. MCGREGOR,
Judge.

AFFIRMED.

A. L. Thomas for appellant.

D. H. McIntyre, Attorney General, for the State.

Evidence of other like attempts was admissible to show the intent with which the act was done. Wharton Crim. Ev., (8 Ed.) § 31, *et seq.*; 3 Greenleaf Ev., (14 Ed.) § 15. Such evidence has been admitted in like cases. *Comm. v. Coe*, 115 Mass. 481; 1 Cen. Law Jour. 481; *Comm. v. Stone*, 4 Met. 43; *Bainbridge v. State*, 30 Ohio St. 264; *Gassenheimer v. State*, 52 Ala. 313. The clerk had a special property in the money. Larceny could have been committed of it in his hands, and so could the offense charged. 1 Wharton Crim. Law, (8 Ed.) §§ 932a, 938; *Comm. v. Butts*, 124 Mass. 449; *State v. Nelson*, 11 Nev. 334.

PHILIPS, C.—The defendant was indicted under section 1561, Revised Statutes 1879, for an attempt by trick and fraud, to obtain from one P. K. Beard, the sum of \$1, the property of said Beard. He was found guilty and sentenced to a term of two years in the penitentiary. From that judgment he prosecutes this appeal.

1. At the conclusion of the State's evidence the defendant demurred thereto. The ground of this objection is, that the proof failed to show that said Beard was the owner of the money in question. The evidence was, that Beard was a clerk in the store of Miller and Graves. He was employed by the month. He stated on the trial that the money did not belong to him, but to said Miller and Graves. In their absence he had charge of the money. Whether they were absent from the store at the time of the alleged attempt by defendant does not appear from the evidence.

To constitute a good indictment for larceny at common law the thing stolen must be charged to be the property of the actual owner, or of a person having a special property as bailee, and from whose possession it was stolen. 2 Arch.

C. P. 257. Chitty states the rule thus: "It is a clear maxim of the common law, that where one has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. Thus, a butler may commit larceny of plate in his custody, or a shepherd of sheep. The same of a servant intrusted to sell goods in a shop. This rule appears to hold universally in the case of servants, whose possession of their master's goods by their delivery or permission is the possession of the master himself." While the servant may have the charge he has not the possession of the master's goods; this for the legal reason that the possession of the servant is that of the master. And, therefore, it is well understood and established that the servant may commit larceny by converting to his own use the property entrusted to him. 2 East P. C. 564, 652, 653, 682. In *People v. Call*, 1 Denio 120, the court after announcing the foregoing doctrine, says: "This principle applies to servants, strictly so called, as it also does to apprentices, clerks and workmen of every description, who are employed in the care and management of the owner's property under his immediate supervision and control. See 1 Whart. Cr. L. (8 Ed.) 929. In *Regina v. Green*, 37 Eng. L. & Eq. 597, the prisoner was indicted for stealing two pairs of boots alleged as the property of Rowland Britton. The evidence showed that Rowland was the son of John Britton, the owner of the shop from which the boots were taken by the prisoner. Rowland staid in his father's shop as clerk without hire. In the temporary absence of the father, the son being left in charge of the shop, the goods were taken. On the disclosure of these facts at the trial the crown entered a *nolle*, and at once re-indicted the prisoner for stealing the goods of John Britton. The prisoner to this indictment entered a plea of *autrefois acquit*, based on the former proceeding. On argument before the full bench, the plea was held bad, on the ground that the boy

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was not a bailee, but a mere servant. The court said: "The goods remained all the time in the father's possession, and could not have been laid as the property of the son." To the same purport are the cases of *Rex v. Hutchinson, et al.*, Brit. Cr. Cases 412 and *Heygood v. State*, 59 Ala. 49. In the last named case, property in the corn stolen was alleged to be in the superintendent of the plantation, the owner being absent. The court held the superintendent to be the mere servant of the owner of the premises, and discharged the prisoner. "A servant," the court say, "is one who is engaged, not merely in doing work or services for another, but who is *in his service*, usually upon or about the premises or property of his employer, and subject to his direction and control therein, and who is, generally, liable to be dismissed."

Beard was in the strictest sense a servant, the mere clerk of Miller and Graves. He had not the possession of the money in question any more than any article or piece of goods then in the store. Had the prisoner carried off any goods on the counter or shelf, this clerk could not have maintained trespass, trover or replevin therefor. He was not a bailee. The cases to which we have been referred by the State's attorney on examination, are found to range themselves under the head of trustees or special bailees, such as carriers, coach drivers, charged with the duty of transporting and delivering the goods entrusted to them; or cases like that of tailors or shoemakers, to whom goods are delivered to be manufactured for wear. They had a special property interest in them. *State v. Nelson*, 11 Nev. 334. The case of *Comm. v. Butts*, 124 Mass. 449, cited by the State, differs materially from the case at bar. The decision of the court is placed on the ground that the property stolen had "been entrusted to the cashier to be conveyed to the bank; he had a special property in them" (the notes stolen). Besides there was a special statute of the State validating the indictment (Genl. Stat. 1860, Ch. 172, § 12). This statute was enacted presumably, because the previous

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decisions of the Supreme Court of the State, based on common law rules, held a different way.

The section of the statute under which the indictment, under consideration was drawn in the form prescribed, required the name of the owner of the property to be inserted. This variance would invalidate the conviction had in this case but for another section of the statute. R. S. 1879, § 1820. "Whenever, on the trial of any felony or misdemeanor, there shall appear to be any variance *

* in the ownership of any property named or described therein, such variance shall not be deemed grounds for an acquittal of the defendant, unless the court before which the trial shall be had, shall find that such variance is material to the merits of the case and prejudicial to the defense of the defendant." Under this section, while the variance in question is matter of suggestion and defense for the prisoner, it is for the trial court to determine whether it is material to the merits of the case, and prejudicial to the proper defence of the prisoner. If it appears to the trial judge that the defense has probably been misled by the allegation of ownership of property to his prejudice, it would be the plain duty of the court to give him the benefit of such variance and direct an acquittal. It is to be presumed from the action of the trial court in refusing defendant's demurrer to the evidence, that in the judgment of the court the variance was immaterial, or not prejudicial to the defense. On the facts of record we are not disposed to review the discretion of the trial judge. *State v. Wammack*, 70 Mo. 410; *State v. Barker*, 64 Mo. 283.

II. The action of the trial court in admitting certain evidence is assigned for error. To properly understand this issue it is important to explain the nature of the "trick" by which the defendant is charged to have attempted to obtain money from Beard. Beard's testimony was, that the defendant came into the store and asked for a nickel's worth of tobacco. It was handed to him, and in payment he handed Beard a two dollar bill. Beard returned him a

silver dollar and ninety-five cents in change. Defendant dropped the dollar in silver in his pocket, and said he had found a nickel; and laying it on the counter with the ninety-five cents, said he would rather have a dollar piece for it. Thereupon Beard took from the drawer a silver dollar and laid it down. Whereat the defendant remarked that he believed he would rather have the two dollar bill than the silver, and requested Beard to give it to him and take the two dollars in silver on the counter. Whereat Beard reminded him that he had put the dollar in his pocket, and to hand him that. The prisoner then took up his dollar in change and walked out. The prosecuting attorney then introduced other witnesses, by whom he proved, against the objection of defendant, that on the same day near the same time, both before and after the act in question, in the same village, the defendant attempted the same trick on other clerks, and was heard to say to his companion that he had "knocked them down for a one"—alluding to a house which he had just left; and further stated that "my partner has done the town for \$10, and we are getting drunk on the money or over it." The prosecuting attorney stated at the time, that this evidence was introduced for the purpose of showing the *intent* with which the act under investigation was done.

As this presents an important question in the administration of criminal law, about which there is some contrariety of opinion, I have given it much consideration and investigation. It is a general rule that a distinct crime, for which the party might be separately proceeded against, cannot be given in evidence against the prisoner on trial for a single offense. It rests upon the equitable and humane principle that it is unjust to raise a presumption of guilt against the prisoner, on the idea that having committed one offense the moral obliquity or depravity it exhibits makes it probable he would commit another. And as it is difficult to guard against the blunder of the average jury in failing to distinguish the real purpose for which such

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evidence is admitted, as against the bad impression it would likely make on them as to the prisoner's general character, it is contended that it would be safer to exclude it under all circumstances. But the rule has its exceptions, now too deeply and firmly settled not to recognize them. They are exceptions founded in as much wisdom and justice as the rule itself. The most generally recognized exception is to admit other similar acts for the purpose of proving the guilty knowledge of the prisoner in cases of indictments for uttering, or having in his possession false notes, bills of exchange, bank bills, instruments for forging the same and counterfeit coin, and recent possession of stolen property. 1 Lead Cr. Cases, 189; Ros. Cr. Ev., 90; *Com. v. Coe*, 115 Mass. 481; *Heard v. State*, 9 Texas App. 1. The exception also extends to admitting other like acts as proof of the *scienter* in obtaining money under false pretenses, as in the instance of falsely representing the bill of an insolvent bank to be good whereby the prisoner fraudulently obtained property. *Com. v. Stone*, 4 Met. 43, 47. So on an indictment for knowingly delivering skimmed milk to a factory, to be manufactured into cheese, with intent to defraud, evidence of transactions of the same character, other than that named in the indictment, has been admitted for the purpose of showing guilty knowledge. *Bainbridge v. State*, 30 Ohio St. 265. In a comparatively recent case, (the *Queen v. Francis*, reported in 1 Cent. L. J. 481,) the prisoner obtained money by pretending that a certain ring contained diamonds, when in fact it was composed only of crystals. To sustain the charge of criminal fraud, evidence was given by the crown that on a prior occasion the prisoner obtained money by falsely representing that a chain only coated with gold was made of pure gold. Lord Coleridge, C. J., who delivered the judgment, said: "It seems clear on principle that when the act charged is proved, and the only remaining question is whether, at the time he did it he had guilty knowledge of the quality of his act, or acted under mistake, evidence of the class received must be admissible.

It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

Upon the same reason and by equal authority is the proposition maintainable that the exception to the general rule extends to admitting such proof where the question of intent, the *quo animo*, is material to be established. It stands almost on the same ground as proof of the *scienter*. The English authorities are quite decided in admitting the proof of the character in question. In *Queen v. Dossett*, 2 Cox C. C. 243, the prisoner was indicted for setting fire to a rick. It was fired by the prisoner discharging a gun near it. The prosecution offered evidence to the effect that on the day preceding, the rick was on fire, and the prisoner was then near it with his gun in hand. Maule, J., said: "The mere fact of the evidence going to prove another felony is not sufficient to exclude it, if, in itself, it be good evidence. It is only by the conduct of the prisoner that a judgment can be formed whether the act was accidental or intentional. It is not as evidence of a felony, but as evidence of prisoner's intentions, that it may be received." In *Rex v. Voke*, 1 Rus. & Ry. 531, the prisoner was indicted for maliciously shooting another. The state of the proof being such as to raise some doubt whether the shooting was intentional or accidental, evidence was admitted of a previous attempt on the same day by the prisoner to shoot the party. In *Reg. v. Richardson*, 2 F. & F. 343, the prisoner was indicted for embezzlement. The prisoner in rendering account to his employer made it exceed the sum of his actual expenditures from one to three pounds. For the purpose of showing that the act for which he was indicted was not a mistake, the prosecution introduced evidence of instances both before and after the act in question of similar returns. It was held by all the judges, after the fullest consideration, to be competent. In *Rex v. Hogg*, 4 C. & P. 364; 19 Eng. C. L. 420, the prisoner was indicted for administering sulphuric acid to horses with intent to

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kill them. Evidence that the prisoner had hitherto mixed acid with the horses' corn was admitted by Parke, J., "as showing whether the act was done with the *intent* charged in the indictment." In *Rex v. Winkworth*, 4 C. & P. 444; 19 E. C. L. 465, the prisoners came with a mob to prosecutor's house, and one of the mob went up to him and very civilly advised him that he would better give the mob something to get rid of them, which he did. For the purpose of showing that this was not disinterested and honest advice, the prosecutor introduced evidence that this mob at other houses demanded money on the same day while the prisoners or some of them were with them. The competency of it was affirmed by such judges as Parks, Vaughn, Alderson and Lord Tenterden. In *Regina v. Garner and Wife*, 3 F. & F. 681, on the trial of the husband and wife for the murder of his mother by poison, evidence was admitted to show that the former wife of the prisoner died in the same way, "with a view to enable the jury to determine as to whether such was accidental or not." See 1 Greenl. Ev. 53; 3 Russ. on Cr., §§ 285, 288; Ros. Cr. Ev., 86, 89.

The American authorities are, if anything, more pronounced in favor of the competency of this evidence. *Bottomley v. United States*, 1 Story 135, was a proceeding by information on a libel of seizure of goods imported and concealed in fraud of the impost laws. The government, on the trial, introduced evidence of former similar acts of the libellee to show the criminal *intent* of the act in question. Story, J., held the proof competent, *inter alia* "to repel the suggestion, that the act might be fairly attributable to accident, mistake or innocent rashness, or negligence." *Arguendo*, he said: "In all cases where the guilt of the party depends upon the *intent*, purpose or design, with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule, that collateral facts may be examined into, in which he bore a part for the purpose of establishing such guilty *intent*, design, purpose or knowledge." This question came again before this same

learned judge, when on the supreme bench of the United States in the case of *Wood v. United States*, 16 Pet. 342, which was a proceeding similar to the case just cited. For the purpose of showing the fraudulent intent of the libellee the government introduced evidence of other fraudulent invoices, etc. Story, J., in delivering the opinion, said: "The question was one of fraudulent intent or not, and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive, in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. They constitute exceptions to the general rule, excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very substance of the rule; for whatever does legally conduce to establish the points in issue, is necessarily embraced in it, and, therefore, a proper subject of proof, whether it be direct or only presumptive." After stating the exception in favor of the admission of such evidence in proof of guilty knowledge in cases of forgery, uttering false notes and passing counterfeit money, etc., he adds: "Cases of fraud present a still more stringent necessity for the application of the same principle; for fraud being essentially a matter of motive and intention, is often deducible from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy."

In *Osborne v. People*, 2 Park. C. R. 583, this rule was

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recognized and applied. The court say: "The acts of the prisoner while in the store rendered it somewhat doubtful whether the entry was a burglary or a trespass, hence the necessity of the proof to show the intent." And in *People v. Wood*, 3 Park. C. R. 681, evidence of prior offenses, of a similar character, more or less connected with that on trial, was admitted, not for the purpose of proving the act under investigation, but "distinctly and solely for the purpose of establishing the *quo animo*, the motive existing in the mind of the prisoner," in committing the act for which he was indicted. In *Comm. v. Turner*, 3 Met. 19, this question is ably considered by the supreme court of Massachusetts. Turner was indicted jointly with one Shearer for kidnapping a negro boy in Massachusetts and running him off to Virginia. For the purpose of showing that Turner was acting with a guilty intent in connection with Shearer, the prosecution introduced evidence to the effect that on the morning of the same day of the alleged abduction Turner was in company with Shearer, inquiring after another colored boy; and, also, that on the previous day Turner endeavored to procure a colored boy from the overseer of the poor at the alms-house under false pretenses. After stating the general rule, and the exception in admitting such proof to establish the *scienter* when material, Dewy, J., says: "Evidence of other facts than those connected immediately with the act charged, are always admissible, where the intent of the defendant forms a material part of the issue, and where those facts can be supposed to have any proper tendency to establish the intent. * *

The intent and purpose of the defendant, in obtaining the possession and custody of the individual alleged to be unlawfully taken, were to be inferred from circumstances, and necessarily opened a wide door for the introduction of evidence of the acts of the party accused, having any reasonable degree of connection with the particular act complained of. It was with the view of fixing the character of the last act, that evidence was received of the conduct and declara-

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tions of the defendant on the day previous, and at another place, and in reference to another individual. * *

With reference to such purpose, and thus limited, it seems to us to have been properly admitted."

It would be difficult to find, in a like discussion, a case more parallel in its facts and principles, than that of *Trodden v. Commonwealth*, 31 Gratt. 862, in which this matter is reviewed most thoroughly by that eminent jurist, Staples, J. The prisoner was indicted for obtaining goods from M. & Co. upon false pretenses. On the trial the Commonwealth introduced evidence, to the effect, that the accused, in the same city and at or about the same time purchased goods from other parties, upon like false pretenses, for the purposes of showing the intent of the accused in making the representations to M. & Co. It was held admissible for this purpose; and the decision is placed throughout, upon the ground that the evidence bore upon the question of the fraudulent intent with which the act was done. The authorities are collected and reviewed with a master's hand; and they sustain the proposition contended for beyond any reasonable controversy.

In answer to the suggestion of the counsel for the prisoner, that when the prisoner did the act in question, as it was proved he did, the jury must infer the intent from the act; and, therefore, evidence of collateral facts is unnecessary and irrelevant, and calculated to mislead the jury, the court say: "It may be conceded that when goods are obtained by false representations, the jury may justly infer the fraudulent intent. But it frequently happens, in a large majority of cases, there are numerous facts and circumstances, sometimes of a minute and varied character, throwing light upon the conduct and motives of the accused. It is impossible for the court to foresee what may be developed in the progress of the trial. When evidence is offered of other transactions of the accused to show the guilty intent, is the court to say the intent is already conclusively proved, and the evidence is, therefore, irrelevant? What

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would be thought of a judge who would thus prejudge the case and invade the province of the jury. The learned counsel would hardly concede the fraudulent intent of his client upon any state of facts. * * We are asked to say that the evidence set out in the bill of exceptions is irrelevant, upon the assumption that without it the jury must have found the guilty intent on the part of the accused." This and its cognates are fully sustained by the following cases: *Friend v. Hamill*, 34 Md. 298; *Cary v. Hotailing*, 1 Hill 311, 316; *Phillips v. People*, 57 Barb. 354; *Rowley v. Bigelow*, 12 Pick. 311; *Comm. v. Eastman*, 1 Cush. 189; *Comm. v. Tuckerman*, 10 Gray 173; *McKenney v. Dingley*, 4 Greenl. 172; *Bielschowsky v. People*, 3 Hun 46, affirmed 60 N. Y. 616; *Miller v. Barber*, 66 N. Y. 559.

It has been suggested that this doctrine is opposed by so great a jurist as Judge Agnew in the case of *Shaffner v. Commonwealth*, 72 Pa. St. 60. In the course of that opinion he says: "To make one criminal act evidence of another, a connection must have existed between them in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other." The case was one which did not render such evidence material in ascertaining the intent of the party accused.

Hence, it is to be observed that he treats the question as if the attempt was made by the *nisi* court "to make one criminal act evidence of another." In such case, there can be no question but there should be such a connection between the two acts or offenses as to link them together in the mind of the actors, so as to make one follow the other as a means to an end. This was the state of the case in *State v. Greenwade*, 72 Mo. 298. The limitation of the rule as applied by Agnew, J., *supra*, was proper, because there was no question, essentially, of guilty knowledge or intent; for as it is said in the statement of the case: "The evidence tended to show that she died by poison, and the

principal question was, whether the poison had been administered by the defendant."

In the case at bar, the very gist of the offense charged is the criminal intent with which the act was done; and the burden of proof rests upon the State. *Anable's Case*, 24 Gratt. 563, 570. It must be shown affirmatively that the defendant's purpose was to defraud. Such intent is not a presumption of law, but is a fact to be found by the jury. *Trogden's Case*, *supra*. It has been held by the highest authority, in this class of cases, that even the admission of the accused, that the act was done with the criminal intent cannot preclude the State from proving it by any other competent testimony, for the jury are the sole judges of the evidence. *Comm. v. McCarthy*, 119 Mass. 354; *Priest v. Groton*, 103 Mass. 530. Under the facts of this case, it was for the jury to say whether the act of the prisoner was a criminal act, done with a fraudulent intent to obtain the money of the clerk, or whether it was a mistake or effort merely to practice upon him a joke. The jury without violence to reason, under an instruction to give the prisoner the benefit of every reasonable doubt, have convicted him. The prosecuting attorney, as suggested by Staples, J., *supra*, and by Roscoe in his Criml. Ev., 91, had the right to anticipate an obvious defense of the prisoner, that it was a mistake or without criminal intent, and put in, in the first instance, all his evidence bearing on the issue. The evidence further showed that the prisoner started out on that day with the perpetration of the several acts linked together in his mind. His purpose was, to employ his own vulgar but suggestive terms, "to do the town." He did "beat" the unwary out of \$10 by the same attempted "trick."

We think both on reason and authority, the evidence complained of was admissible under the circumstances of this case. The other acts were so recent, and so allied in character and purpose to the one on trial, that they were quite essential to enable the jury to reach a conclusion, just alike to the people and the accused. It was offered with the

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distinct statement by the prosecuting attorney that it was for the purpose of showing the defendant's intention in the attempt upon young Beard. With this limitation on its scope it was properly admitted.

It follows that the judgment of the circuit court should be affirmed. All concur.

BURKHOLDER *et al.* v. THE UNION TRUST COMPANY *et al.*, Appellants.

1. **Railroads: ILLEGAL FREIGHT CHARGES: PLEADING.** In an action against a railroad company under Revised Statutes, chapter 21, article 3, for illegal charges of freight on saw-logs, a petition is sufficient which alleges that plaintiff shipped two car loads of saw-logs over defendant's road a distance of over twenty-five miles and under fifty, that the legal rates were a certain specified sum, that defendant charged and plaintiff paid a different specified sum, being an excess of \$3.20 over the legal rates allowed defendant, and asking judgment for the latter sum.
2. ——— : SAW-LOGS. Saw-logs belong to class J of Revised Statutes, section 834, regulating freight charges of railroads.
3. **Constitutional Law.** The provision of Revised Statutes, section 835, giving the injured party a right of action against a railroad for three times the excess of the legal rate of freight charged by it is constitutional.

Appeal from Moberly Court of Common Pleas.—HON. G. H. BURCKHARTT, Judge.

AFFIRMED

Thos. J. Portis for appellants.

(1) The petition does not state facts sufficient to constitute a cause of action. The laws of this State do not fix a rate for which saw-logs shall be carried over railroads in this State. If respondents desired to show that saw-logs

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belonged to, and were to be included among heavy fourth-class articles, they should have so alleged, and thus afforded appellant an opportunity to deny it and put them to the proof. (2) Section 835 of the Revised Statutes of Missouri, relied upon by respondents in this case, is in conflict with the provisions of the constitutions of Missouri and the United States, as follows: 1. Said section is in conflict with and in violation of the constitution of Missouri, as follows: Article 2, section 20, which declares "That no private property can be taken for private use, with or without compensation, unless by the consent of the owner." 2. Article 2, section 30, which declares "That no person shall be deprived of life, liberty or property without due process of law." 3. Article 4, section 53, which declares "The general assembly shall not pass any local or special law authorizing the granting to any corporation, association or individual, any special or exclusive right, privilege or immunity." 4. Article 11, section 8, which among other things, declares, "The clear proceeds of all penalties and forfeitures and of all fines collected * * shall belong to and be securely invested and sacredly preserved in the several counties, as a county public school fund." * 5. Said section 835 of the statutes of Missouri, is also in conflict with and in violation of article 14, section 1 of the constitution of the United States, which declares "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Hollis & Wiley and Martin & Priest for respondents.

(1) The petition states facts sufficient to constitute a cause of action. R. S., § 833; Bliss on Code Plead., §§ 181, 182. (2) Section 835, Revised Statutes, is not in con-

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flict with either the constitution of Missouri or of the United States. *Barrett v. Railroad Co.*, 68 Mo. 56; *Spellman v. Railway Co.*, 71 Mo. 434. The right of the legislature to pass laws to prevent unjust discrimination in freights and to enforce them by penalties, is a common law right by virtue of a railroad being a common carrier. *Chicago & Alton R. R. Co. v. People, etc.*, 67 Ill. 11.

EWING, C.—This suit was commenced against the defendant on the following petition, after stating the formal parts, and, also, leaving out all of the forty odd counts except one; all being similar in all things save in amount:

“That defendants are, and were at the dates herein-after set out, railroad corporations, owning and operating a certain line of railroad in the State of Missouri, running from the town of Paris to the city of Moberly, Missouri. That on the — day of October, 1878, plaintiffs shipped two car loads of saw-logs from Paris to Moberly over the said railroad, owned and operated as aforesaid by the defendants. That the distance between the aforesaid cities is over twenty-five miles and under fifty miles; that the rate of charges prescribed by law upon the car loads of saw-logs so shipped as aforesaid, is \$14 per car, amounting to \$28; but, instead thereof, the defendants charged and plaintiffs paid the sum of \$31.20, being an excess of the legal rates aforesaid in the sum of \$3.20, for which plaintiffs ask judgment, and that the same be trebled, according to the provision of section 835, of the statutes of this State, and for all other due and proper relief.”

This was demurred to on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, judgment for plaintiffs for treble damages under section 835, Revised Statutes 1879, and an appeal to this court.

I. The statute provides, section 3511, that a petition shall contain “a plain and concise statement of the facts constituting a cause of action * * and a demand

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of the relief to which plaintiff may suppose himself entitled." In this case the petition alleges that plaintiffs shipped two car loads of saw-logs over defendant's road, a distance of over twenty-five miles and under fifty, and that defendant charged and plaintiffs paid an excess over the legal rates allowed defendant for such freight, and asks judgment for a certain sum. These allegations are either true or false. If true, under the statement referred to in the petition, plaintiff is entitled to recover. If untrue, of course he must fail. Upon a simple denial the whole question could have been reached, and the court, by its instructions, would have been called on to interpret the statute.

But the petition states that: 1st, Plaintiffs are partners. 2nd, Defendants are railroad corporations and owned and were operating the road. 3rd, Plaintiffs shipped two car loads of saw-logs from Paris to Moberly, over said road. 4th, The distance from Paris to Moberly is over twenty-five miles and under fifty miles. 5th, The rate of charges prescribed by law for a car load of saw-logs, between said points, is \$14 a car load. 6th, Defendant charged and plaintiffs paid \$15.60 per car load, an excess of legal rates of \$1.60 per car. 7th, Plaintiffs asks judgment for the excess so charged and that amount trebled. It is insisted by the appellant that the petition should have alleged that the saw-logs were heavy fourth-class articles, and belonged to a certain class as fixed by law. That it is not sufficient to state that the rate of charges prescribed by law for saw-logs was a certain sum, and that defendant charged in excess thereof.

This being a general law, good pleading does not require that the particular provisions of the law violated should be pointed out or pleaded, but it is sufficient, as in this case, that the petition alleges the charges "as prescribed by law." Bliss on Code Plead., §§ 181, 182. The question then arises on this demurrer, does the law prescribe the rate of freights for saw-logs. "Courts will take judicial notice of the popular meaning of words and phrases."

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Bliss on Plead., § 191. A "log" is a "bulky piece or stick of wood or timber." Webster, Worcester. The word saw-log has a well known popular meaning, and in all cases means a heavy piece or stick of wood, or body of a tree cut convenient lengths for the purpose of being sawed into lumber. But appellants contend that the class of freight to which saw-logs belong should have been alleged for the purpose of ascertaining the rate therefor fixed by law, if any.

But, as we have seen that the allegations under the statute are sufficient, the next question is the construction of the statute. Does that fix the rate of freight on saw-logs? It does not by name. But the statute was enacted for the purpose of preventing excessive charges for transporting any and all kinds of freight. It must mean this or nothing. It reads: Section 833, "All freights hereafter transported upon any railroad or part of railroad in this State are hereby divided into four general classes." These four classes must include all freights, and by section 834 excessive freights are prohibited. Again, all freights are divided into seven special classes, designated by the letters D, E, G, H, I and J. Class D is for grain in car loads. Class E is flour and lime in lots; class F is salt, cement, water, lime and stucco; class H is for live stock; class I is for agricultural implements, furniture and wagons. So it is evident saw-logs would not go in either of these five classes, and there are only two special classes left, to-wit: G and J. But all freights hereafter transported upon any railroad or part of a railroad in this State, are to come under one of these special classes. Hence they must belong to class G or J, not by act of the commissioners, but by virtue of the law. The language of the statute is imperative, and reads "are hereby divided into." Not may be or shall hereafter be, and the maximum of freight is prescribed. Section 834. "Class G not exceeding \$8 per car load for the first twenty-five miles." Same section, "class J not exceeding \$8 per car load for the first twenty-five miles."

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and not exceeding \$6 per car load for the second twenty-five miles." "Class J shall comprise coal, brick, sand, stone, railroad ties and cord-wood, and all heavy fourth-class articles in car loads." Do not saw-logs come within "All heavy * * articles in car loads?" But, it is said the statute does not show that they are "fourth-class." The law fixes all freight in one of the four classes. We have seen that saw-logs cannot belong to D, E, F, H, or I, but must belong to one of the four, and hence must belong to G or J. "G shall comprise lumber, lath and shingles in car loads," and nothing else. J, all heavy articles in car loads, so that saw-logs being heavy articles, and not being comprised in any of the other classes, must belong to class J. Because all other classes designate what shall compose those classes. Class J specifies certain articles, and then adds all other heavy articles in car loads. Hence, in my opinion the court below did not err in overruling the demurrer.

II. The constitutional questions presented by the appellants were fully considered in an elaborate and well considered opinion at the last term of this court by PHILIPS, C., and saves the necessity of further notice here. *Humes v. Mo. Pac. R'y Co.*, ante, p. 221.

The judgment of the court below is affirmed. All concur.

LEWIS, Administrator, v. McDANIEL, Appellant.

1. **Action, Abatement of.** An action for slander does not abate, pending an appeal to the Supreme Court, by reason of the death of plaintiff in whose behalf the judgment was rendered.
2. **Slander.** Words charging that plaintiff was a thief and had stolen hogs, impute a felonious offense, and are actionable *per se*.
3. **Slandorous Words, proof of.** All the slanderous words charged need not be proved. It is sufficient if those proved contain the

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poison to the character and constitute the precise charge of slander alleged.

4. **Instruction: QUANTUM OF PROOF.** An instruction in this case held not erroneous because it authorized a verdict for the plaintiff, if the jury should find that enough of the exact words charged to substantially constitute the charge imputed were spoken.
5. **Slander: PLEADING.** In an action for slander words spoken on different occasions may be set forth in one count, and included in the same cause of action.
6. **The Objection** that the jury took with them to their room a refused instruction of the opposite party, is made too late in the motion for a new trial.

Appeal from Franklin Circuit Court. — HON. A. J. SEAY,
Judge.

AFFIRMED.

Crews & Booth and Thos. B. Crews for appellant.

The words charged are not actionable, and the words proved are not only not the same in substance, but are not even equivalent, and do not convey the same ideas. The first instruction for plaintiff was erroneous in the use of the words "in substance," or "substantially." *Attebury v. Powell*, 29 Mo. 427. It is exclusively the province of the court to determine whether there is such an identity between the words proved and those charged in the petition as will support the action. *Berry v. Dryden*, 7 Mo. 324. The verdict was erroneous in being a general one on two causes of action. *Johnson v. Dickers*, 25 Mo. 580; *Brady v. Hash*, 46 Mo. 461. The judgment should be reversed because the jury carried a refused instruction of plaintiff with them to the jury room. R. S., § 3655.

T. A. Lowe for respondent.

There was no substantial error in the trial. The second and third clauses of the petition stated sufficient facts to constitute a cause of action. *Elfrank v. Seiler*, 54 Mo. 134.

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It was not necessary to aver and prove special damage, as the law presumed malice. *Birch v. Benton*, 26 Mo. 153; *Barbee v. Hereford*, 48 Mo. 323. There was no fatal variance between the words charged and those proved. *Birch v. Benton*, *supra*; *Pennington v. Meeks*, 46 Mo. 217. The first instruction for respondent was proper. Cases just cited. The attention of the lower court was not called to any irregularity in permitting respondent's fourth instruction to go to the jury. The Supreme Court will not consider such exceptions not taken at the time the error is committed. *Sweet v. Maupin*, 65 Mo. 68; *De Graw v. Prior*, 53 Mo. 314. The objection comes too late on motion for new trial or in arrest. *Hirt v. Hahn*, 61 Mo. 496; *Berry v. Smith*, 54 Mo. 148. The rule that where there are two counts, there must be a verdict on each count does not apply in this case. *Brady v. Connelly*, 52 Mo. 19; *Pennington v. Meeks*, 46 Mo. 217; 1 Starkie on Slander, p. 434. The judgment did not abate by reason of the death of plaintiff. *Lewis v. Railroad Co.*, 59 Mo. 495.

RAY, J.—At the November term, 1878, of the circuit court of Franklin county, the respondent filed his petition in an action for slander, in three clauses, in substance as follows:

1st, That on or about the 25th day of December, 1876, in the vicinity and neighborhood of respondent and appellant, in the county of Franklin, the appellant maliciously intending to injury the respondent in his good name, fame and credit, etc., in the hearing of one John Lefler and others spoke of and concerning the respondent the following false, malicious and defamatory words: "John Thompson killed my hogs and eat them, and I want him (respondent) to hear it, and know that I said it."

2nd, That the appellant still further intending to injure the respondent in his good name, fame and credit, and to cause it to be suspected and believed by neighbors and other good citizens of the vicinity that the respondent was

guilty of the offenses and misconduct hereinafter mentioned and charged upon him in a certain discourse which the appellant had on or about the 13th day of August, 1878, at a store in the presence and hearing of one H. H. Tupker and divers other good citizens, falsely and maliciously spoke of and concerning the respondent, the following false and defamatory words, that is to say: "John Thompson killed my hogs and I can prove it, and he (meaning respondent) is the biggest thief on this creek, and I can prove it by Val. Mitchell and his boys that he (meaning respondent) has stolen my hogs."

3rd, That further intending to injure respondent, etc., the appellant on or about the 15th day of August, 1878, spoke of and concerning the respondent, in the presence and hearing of one Valentine Mitchell and other citizens, the following false, malicious and defamatory words: "John Thompson's water gates were traps to steal other people's stock in," thereby intending to injure respondent in his good name, etc., and to create the belief that he was a hog thief, and to bring him into disgrace Wherefore he prayed judgment for \$5,000 and costs.

The answer is a general denial, and also a specific denial of each allegation and of any attempt to injure respondent, or that he was injured.

At the inception of the trial the appellant objected to the reception of any evidence, on the ground that the petition did not state facts sufficient to constitute a cause of action. The court sustained the objection as to all matters alleged in said first clause, and excluded all evidence in regard thereto, and this part of the petition, under this ruling, and the result of the trial, becomes wholly immaterial. The court overruled said objection as to the matters alleged in said second and third clauses of the petition, and admitted the evidence offered by the respondent to sustain them, to which action of the court the appellant excepted. Under the evidence and the instructions the jury returned a verdict for one cent, and judgment was thereupon given for

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this amount and costs, and the case appealed to this court. It may be stated that, after the appeal was taken, the respondent died, and said Mahlon R. Lewis was appointed administrator of his estate by the probate court of Franklin county, and said Lewis has been duly substituted upon the record in this court.

In a case like this the suit does not abate by death of plaintiff, pending the appeal in this court, and no such objection is here urged. See 59 Mo. 495, 503. The objections urged to the petition in this case are not, we think, well taken. The words set forth in the second and third clauses of the petition plainly impute to and charge the respondent with a felonious offense, and were actionable *per se*. The law in such case imports a damage, and no averment of special damage was necessary.

Upon the trial the witness Tupker, in whose presence, among others, the slanderous words set out in the second clause of the petition are charged to have been spoken, testifies as follows: "I know defendant. I had a conversation with him on Calvey Creek in August, 1878. He said to me, talking of plaintiff, 'You lean to Thompson, he is the biggest thief on the creek, and he could prove it by Mitchell's boys that he killed his hogs.' There was no more said. I went away to my work." The objection is made that the words thus proved are different from the words charged. It is contended for appellant that the only words in said second clause that are to be construed as actionable in any event, are the words, "I can prove by Val. Mitchell and his boys that he has stolen my hogs," and that the words used by the witness, "He could prove by Mitchell's boys that he has killed his hogs," are not substantially the same words and have not even a similar import. If the words thus quoted were all the words employed, and those that alone constituted the charge made in this part of the petition, then, we think, there would not merely be a variance therefrom in the evidence of the witness, but there would be a total failure of proof. Many of the technicalities and nice-

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ties with which actions of this description, both as to pleadings and proof, were formerly incumbered, arising in part from the anxiety of courts to discourage such actions, are not at this day and under our system, to be approved. The strictness formerly observed as to proving all the words, and only the words and precisely as said, is not now required. All the words need not be proved; some of them may be omitted, provided those proved are words containing the poison to the character and constitute the precise charge of slander averred. *Birch v. Benton*, 26 Mo. 161; *Pennington v. Meeks*, 46 Mo. 217.

In addition to the words in the second clause of the petition, to the effect, that he could prove by Val. Mitchell and his boys that respondent had stolen his hogs, the following words were also charged: "John Thompson killed my hogs, and I can prove it, and he is the biggest thief on this creek." If the clauses of the sentences in the second set of slanderous words of the petition, and in the above language of the witness are transposed, and this in no wise affects the sense, it becomes apparent, we think, that the poisonous words thus charged and those proved are identical, and not merely substantially the same. In the pleading and proof the direct and unqualified affirmation is made by appellant in speaking of respondent upon the subject of the hogs, that respondent is a thief, and the words charged in the petition and omitted from the proof that he could prove it by Mitchell and his boys that he had stolen his hogs, may be treated as superfluous. They were neither necessary to be averred or proved.

We do not think the words, "he is the biggest thief on this creek," are in their proper connection here with other allegations, and after verdict of the jury under the instructions, to be regarded merely as an imputation of bad principles or evil propensities. When the term thief is thus applied, it is to be presumed that it is used in a felonious sense, and when admitted or shown to have been used by satisfactory proof, it should then devolve upon the defendant to

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show that it was not employed in such felonious sense. In this case the defense is a denial that appellant spoke the words, and as there is a conflict in the evidence, the finding of the jury is conclusive upon us. Even if the term thief, as here used, were to be regarded as a general term, and not used in reference to the hogs, it is, nevertheless, well settled that an action is maintainable for a general imputation conveyed in apt terms. Starkie on Slander, p. 85.

In regard to the instructions, we do not deem it necessary or important to set out or comment upon the second, third and fifth, given for the respondent, as they all went merely to the measure of damages, and the verdict of the jury was for one cent. The two remaining instructions, given for the respondent, are the first and sixth, and are as follows :

1. That if the jury believe from the evidence that the defendant spoke of and concerning the plaintiff, in the presence and hearing of H. H. Tupker, or others, as mentioned in the petition, the words in the petition, alleged, to-wit : "John Thompson killed my hogs, and I can prove it, and he is the biggest thief on this creek, and I can prove by Val. Mitchell and his boys that he has stolen my hogs," or that enough of the words stated in the petition have been proven to substantially constitute the charge imputed to plaintiff, then the jury must find for the plaintiff.

6. That if in this case the jury find that defendant spoke the slanderous words as charged in the second and third counts of plaintiff's petition, then the law presumes they were spoken maliciously, and it is not necessary to prove any express malice in order to warrant a verdict for plaintiff.

On behalf of appellant the court gave the following :

1. The court instructs the jury that the defendant is charged by plaintiff with speaking of plaintiff the following words : "John Thompson killed my hogs, and I can prove it; he is the biggest thief on this creek, and I can prove it by Val. Mitchell and his boys that he has stolen

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my hogs." And with speaking of plaintiff the following words: "John Thompson's water-gates were traps to steal other people's stock in;" and unless they believe from the evidence that defendant spoke of plaintiff the said words, or so much of the said words as may be sufficient to constitute a charge that the plaintiff stole hogs, or was a hog thief, they must find the issues in this cause for the defendant.

3. (As copied in the record, this is in the precise language of the first instruction.)

4. The court instructs the jury that in making up their verdict in this case they must not take into consideration any evidence of any words spoken by defendant after the 4th day of October, 1878.

5. The court instructs the jury that it is incumbent upon the plaintiff to prove his case by a preponderance of evidence, and unless the jury so find, their verdict should be for the defendant.

The following instruction, number two, set out in the transcript, was asked by the appellant and refused by the court:

2. The court instructs the jury that defendant is charged by plaintiff with speaking of plaintiff the following words: "John Thompson killed my hogs, and I can prove it. He is the biggest thief on this creek, and I can prove by Val. Mitchell and his boys that he stolen my hogs;" and with speaking of plaintiff the following words: "John Thompson's water-gates were traps to steal other people's stock in;" and that unless they believe from the evidence that defendant spoke of plaintiff the said words, or so much of the said words as may be sufficient to constitute a charge that the plaintiff stole hogs, or was a hog thief, they must find the issues in this cause for the defendant, and in considering of their finding upon this issue they must not take into consideration any words spoken by defendant not charged in the petition."

This instruction, blending as it does both sets of words

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and requiring their proof, or so much thereof as may be sufficient to constitute the charge, etc., to say the least of it, is of doubtful propriety; and, under the pleadings and evidence in the cause, we are not prepared to say that its refusal could have materially affected the merits of the action to the prejudice of defendant, and in such case its refusal furnishes no sufficient cause for a reversal. We are confirmed in this view from a consideration of the other instructions given in the cause.

It is urged that the first instruction given for respondent is fatally erroneous, because of the use therein of the word substantially. In *Attebury v. Powell*, 29 Mo. 429, the words "in substance" in an instruction in an action of slander, were held to be objectionable by themselves without further qualification. We do not see, however, that this word substantially, as used in this instruction, should be held fatal. The jury are not required to find that the substance of the words was spoken, but that the very words charged, or enough of the exact words to substantially constitute the charge imputed, were spoken. The phraseology employed in the first instruction given for appellant is perhaps to be preferred, but the difference between them is, we think, verbal, and as qualified by the entire charge, we do not see that there was anything to mislead the jury in the first instruction. No specific objection has been urged here to the sixth instruction, *supra*, and the doctrine therein announced we think correct.

But one instruction asked by appellant was refused, and this was instruction number two. In addition to what has already been said in this behalf, we may add that it was properly refused, for the reason that it required the jury, if they did not find the words were spoken as said in the third clause of the petition, to find the issue for the appellant. The point is made by the appellant in the motion in arrest, that there are three different causes of action alleged in the petition, and that the verdict is objectionable as being general and the assessment of damages entire.

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Where the petition contains more than one count for separate and distinct causes of action, the verdict should be on each count. *Brady v. Connelly*, 52 Mo. 19. But in actions for slander different sets of words spoken on different occasions, may be set forth in one count and be included in the same cause of action. If we disregard the first clause, which was in effect stricken out by the action of the court, the petition in the case before us, while it contains two different sets of words in the two clauses thereof, has but one count; has but one conclusion or prayer claiming damages, and contains, we think, but one cause of action. In this particular it falls within the rule heretofore laid down by this court in *Birch v. Benton*, 26 Mo. 157. and *Pennington v. Meeks*, 46 Mo. 217.

The remaining objection that the fourth instruction asked by plaintiff and refused by the court, was on the same sheet of paper with the first, second and third instructions given for plaintiff, and was taken by the jury with them and kept by them all the while they considered of their verdict, is not well taken, and if so, comes too late. In point of fact, the record does not show that said instruction was so taken and kept by the jury while they were considering of their verdict. All that appears on the record in that behalf, is found in appellant's motion for a new trial. Among the reasons assigned therefor, it is alleged that said fourth instruction was so taken and kept by the jury, but that allegation is not supported by any proof to that effect, or other statement in the record that such was the case, and for aught that appears the motion may have been overruled for that reason. Besides that, the record, after specifying what instructions were given and what refused, proceeds to state that "under instructions so given by the court, the jury found for the plaintiff, and assessed his damages at one cent." From this it is to be inferred in the absence of anything else in the record to the contrary, that the finding and verdict of the jury was alone under the instructions so given, and not under those re-

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fused, or any one of them. In the case of *Grove v. City of Kansas*, 75 Mo. 677, 678, in a kindred question to this, it was held that "it is too late for the defendant to raise the objection for the first time in his motion for a new trial." In this case, as in that, it does not appear that any objection of this sort was made at the time of giving the instructions to the jury on their retirement, if the instruction in question was among them; nor does it appear that the matter was in any way called to the attention of the trial court prior to the motion for a new trial. It was his right and duty at the time to see that none but proper instructions were carried by the jury to their room on their retirement for the consideration of their verdict, or show some excuse therefor.

Finding no error in the record, the judgment of the circuit court is, therefore, affirmed. All concur.

CUNNINGHAM *et al.* v. SNOW, *Appellant.*

1. **Ejectment: SENIOR PATENT.** In ejectment, where the issue under the pleadings is one at law, a senior patent will prevail over a junior one.
2. **Statute of Limitations: COUNTY.** The law of this State in force in 1858 did not exempt a county from the bar of the statute of limitations running against it.
3. —: **INFANCY.** When the statute of limitations has begun to run, neither infancy nor anything else will interrupt it.
4. **Practice: DECLARATIONS OF LAW.** The court, sitting as a jury in the trial of a cause, should not deny to a party declarations of law applicable to the facts of the case.

Appeal from Pemiscot Circuit Court.—HON. J. D. FOSTER,
Judge.

REVERSED.

Ward & Ward and J. B. Dennis for appellant.

(1) The appellant had the better paper title. (2) The appellant had also a good title under the statute of limitations, for the testimony that Snow had been in actual, continued, open, notorious, hostile and adverse possession of the premises under a warranty deed from Hill for about twenty-three years before the institution of this suit, and possession of any part of the tract was possession of the whole. *Bradley v. West*, 60 Mo. 33; *Key v. Jennings*, 66 Mo. 356; *Hamilton v. West*, 63 Mo. 93; *Crispen v. Hannaven*, 50 Mo. 536; *Rannels v. Rannels*, 52 Mo. 108. Even after the patents were issued in 1867 Cunningham could not defeat the running of the statute of limitations by conveying to his children, October 2nd, 1875. *Rogers v. Brown*, 61 Mo. 187; *Lander v. Perkins*, 12 Mo. 238; *Smith v. Newby*, 13 Mo. 159; *Williams v. Dongan*, 20 Mo. 186; *Dessaunier v. Murphy*, 33 Mo. 184.

Lewis Brown for respondents.

Pemiscot county had the legal right to convey the land in question to Powell, by its deed of August 5th, 1867; the destruction or cancellation of said deed would not re-vest the title in the county even by consent of the grantor and grantee. *Tibeau v. Tibeau*, 19 Mo. 80. The statute of limitations did not begin to run until the county had parted with its title, which was August 5th, 1867. R. S. 1865, p. 746, § 7. Cunningham's deed to plaintiffs is dated August 2nd, 1867, and at that time, as well as now, plaintiffs were minors, having the right of entry and of action, but against whom the statute does not run. R. S. 1865, p. 746, § 4; R. S. 1879, § 3222.

PHILIPS, C.—This is an action of ejectment to recover eighty acres of what is known as swamp land, ceded to the State by the act of congress of date September 25th, 1850,

I. As both parties claim title under the county, it is conceded the title was in the county in 1857. It may be, also, observed that from the manner of the trial of the cause, it is manifest that both parties concede that the land was swamp land in contemplation of the several acts, congressional and legislative, under which it was ceded. By act of the legislature, approved February 27th, 1857, (Laws Mo. 1856-7, § 1, pp. 271, 272,) it is provided that the county court of Pemiscot county, when "satisfied that full payment has been made according to the terms of sale for any of the swamp lands sold as swamp land, etc., shall cause to be issued to the purchaser a patent therefor." Section 2 prescribes the essential recitals of such patent, and by whom it shall be executed. The patent to Powell is in conformity with this statute, as to matter of form; and was effectual to pass the title of the county to this land and vest it in Powell, provided the title was in the county at the time of issuing the patent.

The patent read in evidence by defendant was junior in date, and, of course, did not convey any legal title to the patentee, as it had already passed under the antecedent grant to Powell. To meet this aspect of the case, the defendant introduced as a witness one Faust, who testified that as acting register of the land office of that county, in 1857, he cancelled the prior certificate of entry issued to Powell on account of some supposed or proven fraud Powell had perpetrated upon the county in a contract for improvements; and that he permitted Hill to enter the land and issued him a certificate. Reliance for the authority of this official's act is placed, by appellant's counsel, on section 17 of the act of the legislature in relation to swamp lands in certain counties, approved March 1st, 1855. Laws Mo. 1855, p. 157. It is too palpable for argument that this section has no application to such entries as these. It applies solely to pre-emption claims, and controversies arising thereunder, between pre-emptors, of a specified class, and limited as to time of entry. Neither Powell nor Hill were

and afterwards ceded by the State to Pemiscot county. Both parties claim under the county. It appears from the evidence that one Powell entered this land in 1857, and received therefor from the proper officer a certificate of entry. Powell contracted this with other lands, to one Franklin Cunningham; but failing to make deed therefor, the title of Powell was by the judgment and decree of the circuit court of said county divested out of him and vested in said Franklin Cunningham. The date of this judgment does not appear from the record before us. In 1875, Cunningham conveyed to the plaintiffs by warranty deed in consideration of love and affection he bore them as his children. The plaintiffs are minors.

On the 5th day of August, 1867, the county, by the presiding judge of its county court, attested by the clerk, made and delivered a patent to said land in favor of said Powell, his heirs and assigns. The defendant's claim to title is as follows: In 1857, but subsequent to Powell's entry and purchase, one Hill entered this same land and received from the same officer a certificate of entry. The register of the county land office testified, in substance, that he discovered that Powell's entry was fraudulent in some way, and he set it aside, cancelled the entry, and permitted Hill to enter it. In November, 1857, Hill conveyed by deed of warranty to defendant.

In 1867, but subsequent to the issue of the patent to Powell, the county executed a patent to said land in favor of Hill. Defendant, also, pleads the statute of limitations, alleging and proving, if his evidence is to be credited, that he had held adverse possession of said land since 1858.

The trial was had before the court sitting as a jury. The court declined to consider any instructions in the case, for the reason that the cause was heard by the court and not by a jury. The court found the issues for plaintiffs, and entered judgment accordingly. After ineffectual motions for new trial and in arrest, the defendant has brought the case here on appeal.

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pre-emptors in contemplation of this statute. They were purchasers simply in 1857. It must follow that this act of Faust was a naked assumption of authority. He was clothed with no jurisdiction over the subject matter. His act, therefore, was a nullity. The statute creating his office was both the source and limit of his duties and powers.

What this witness meant in stating that he cancelled Powell's certificate of entry, is not very clear. For he states in the same connection that he "filed it in the office of the county clerk of Pemiscot county." Why he should so file it after its cancellation, is not explained. Evidently what he is pleased to designate as a "cancellation," was not indorsed on the certificate, otherwise it is singular that the county court would afterwards base the issue of the patent to Powell thereon. Be this however as it may, the subsequent issue of the patent by the county court to Powell, with the statutory recitals, was presumptive evidence that Powell had conformed to the law entitling him to a deed, and was, by express provision of said section 2, act of 1857, *supra*, "at all times, and in all courts, and other places *
* *prima facie* evidence of title to the lands and real estate therein named." This, under the pleadings, being a naked action of ejectment and an issue at law, the senior patent must prevail over the junior. *Allison v. Hunter*, 9 Mo. 750; *Griffith v. Deerfelt*, 17 Mo. 31; *Carman v. Johnson*, 20 Mo. 110; *Steel v. Smelting Co.*, 106 U. S. 447; *U. S. v. Atherton*, 102 U. S. 372; *Smelting Co. v. Kemp*, 104 U. S. 636.

II. There was no objection to the introduction in evidence of the judgment divesting the title of Powell and vesting it in Cunningham, nor to the deed from Franklin Cunningham to these plaintiffs. On their face they were sufficient to pass the legal title of Powell, acquired under his patent.

III. The defendant, however, interposed the plea of the statute of limitations. On the evidence introduced by him, if credited, we do not perceive why this defense did not avail, except it be on the theory entertained by the

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court that the statute of limitations does not apply to this case. The evidence of defendant was that: "I took possession of this land in 1858, under my deed from Hill, and have been in actual, open, notorious, adverse and hostile possession of it ever since." There were other corroborative facts and circumstances in evidence of this statement of defendant. There was no countervailing proof. If this testimony is credible, the title, by limitation, is clearly in the defendant. Although Hill's deed to defendant may have been ineffectual to pass the legal title, it constituted color of title. And if the defendant entered into the possession thereunder, and he and his tenants, for the requisite ten years, consecutively, held the open possession of the land, as stated by him, under assertion of title, such facts as effectually vested the legal title in him and his assigns as if he held under a senior patent from the government, state or county. *Fugate v. Pierce*, 49 Mo. 441; *Nelson v. Brodhack*, 44 Mo. 596; *Hamilton v. Boggess*, 63 Mo. 233.

In answer to this plaintiffs' counsel contend that as this land belonged to the county the maxim, *nullum tempus occurrit regi*, applies; and, therefore, the statute of limitations did not begin to run until the title, the fee, emanated from the county in 1867; and as plaintiffs were then and yet are minors, their disability prevented the statute from running against them. This is no longer an open question in this court. It has been repeatedly held that under the statute in force in 1858, when the defendant claims his adverse possession began, the statute of limitations did apply to lands thus held by counties; and subsequent statutes expressly declare that the running of such limitation is not interrupted by anything contained in the subsequent enactments. *Abernathy v. Dennis*, 49 Mo. 468; *School Directors, etc., v. Georges*, 50 Mo. 196; *Burch v. Winston*, 57 Mo. 65. If the limitation did begin to run against Powell and Franklin Cunningham, the grantors of plaintiffs, its course was not interrupted by reason of plaintiffs' minority. There is no tacking of disabilities under our statute. When the

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statute begins to run nothing stops it. *Smith v. Newby*, 13 Mo. 159; *Williams v. Dongan*, 20 Mo. 186; *Rogers v. Brown*, 61 Mo. 187.

IV. The trial of this case was had before the court, sitting as a jury. Complaint is made by appellant of the action of the court in refusing to entertain any instructions offered in the case. The court announced that, as the trial was before the judge, instructions were not permissible, and he would not give any that might be asked. In this the court was in error. This not being a proceeding in equity, nor upon an agreed statement of facts, but an action of law, the parties were entitled to demand a jury. In all such trials the parties are entitled to have declarations of law applicable to the case. The submission of the case to the court, sitting as a jury, in no wise takes away this statutory right. In no other way can it be ascertained upon what theory of law the court determined the cause. *Davis v. Scripps*, 2 Mo. 187.

In a case like this, a simple action of ejectment, on the general issue, tried before the court without the intervention of a jury, if there be no exceptions to evidence or other matter saved on the trial, and no declarations of law asked, given or refused, the finding of the court, on the facts, would not be reviewable here on appeal or writ of error. For the palpable reason that there would be no errors of record for the court to review. This has been repeatedly decided by this court. *Altum v. Arnold*, 27 Mo. 264; *Conran v. Sellev*, 28 Mo. 320; *Easley v. Elliott*, 43 Mo. 289; *Wilson v. Railroad Co.*, 46 Mo. 36; *Weiland v. Lemuel*, 47 Mo. 322.

We think the ends of justice will be best subserved by remanding this case for re-trial on the merits, in accordance with this opinion. It is accordingly reversed and remanded. All concur.

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BOWEN *et al.*, Plaintiffs in Error, v. McKEAN *et al.*

Husband and Wife: LAND, PURCHASE OF IN PART WITH WIFE'S MONEY: TRUST. A husband received from his wife money arising from the sale of her real estate, under an agreement to invest it in land in her name. He purchased land, paying for it in part with her money and in part with his own and took the title in his own name; *Held*, that the wife was entitled to have in her own right, exempt from subjection to the husband's debts, such portion of the land as the amount of her money paid thereon bore to the whole sum paid.

Error to Cass Circuit Court.—Trial before HON. F. M. BLACK, Judge of the Twenty-fourth Judicial Circuit.

AFFIRMED.

C. W. Sloan, R. T. Railey and Boggess & Moore for plaintiffs in error.

No one can, by paying a part of the consideration and purchase price of real estate, become a joint tenant in the ownership thereof or of a right therein, to any definite or defined extent, without having furnished and paid some aliquot part of the purchase price, with the distinct understanding or agreement that for the money so furnished and paid, some aliquot part, or proportion, or some defined interest or estate should thereby be acquired by the person so furnishing such money. *Bresnehan v. Sheehan*, 125 Mass. 11, 13; *McGowan v. McGowan*, 14 Gray 119, 121, and authorities; *Buck v. Warren*, 14 Gray 122; *Snow v. Paine*, 114 Mass. 520, 526; *Olcott v. Bynum*, 17 Wall. 44, 59; *Cuttle v. Tuttle*, 19 N. J. Eq. 561, 562; *Baker v. Vining*, 30 Me. 121. The conveyance to Thomas McKean was without consideration, and he being insolvent at the time, it is fraudulent and void. R. S., § 2497; *Woodson v. Pool*, 19 Mo. 340; *Potter v. McDowell*, 31 Mo. 62; *Powley v. Vogel*, 42 Mo. 291. The answer of Thomas and Thompson McKean did not tender any issue, as it denied only the material allegations of the petition. *Long v. Long*, 79 Mo. 644.

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Eliza McKean having failed to testify in her own behalf, when all the alleged facts on which she predicated her claim were peculiarly within her personal knowledge, the evidence must be construed strongly against her. *Baldwin v. Whitcomb*, 71 Mo. 651; *Mabery v. McClurg*, 74 Mo. 575.

Comingo & Slover with *John T. Lawdor* for defendants in error.

Defendant, Eliza McKean, furnished \$840 of the money with which the land in controversy was bought, and her husband furnished the balance. He having received the \$840 from her, with an agreement at the time of doing so, that he would invest it for her, the fact that he advanced a part of the purchase money for said land, and took the title thereto in his own name, does not deprive her of her equitable interest therein. She was entitled to her proportionate part of the property thus purchased, and paid for, with her money. *Thompson v. Reno*, 12 Mo. 157; *Sloan v. Torrey*, 78 Mo. 623; *Bumgartner v. Guessfeld*, 38 Mo. 41, and citations; *Thorp v. Thorp*, 3 Met. (Ky.) 272; *Lyon v. Akin*, 78 N. C. 258; *Rhea v. Tucker*, 56 Ala. 450; *Botsford v. Burr*, 2 Johns. Ch. 405; *Tibbetts v. Tilton*, 31 N. H. (11 Foster) 282, 283, and citations; *Hall v. Young*, 37 N. H. 147, 148, and citations; *Sheldon v. Sheldon*, 3 Wis. 703, 704; 2 Bishop's Law of Married Women, §§ 125, 126.

EWING, C.—Plaintiffs commenced suit in Cass county, alleging substantially that they were husband and wife, and that on the 24th day of November, 1880, they obtained judgment for \$18,320 against the defendant Thomas McKean. That then and now said Thomas McKean was largely in debt and insolvent; that on August 3rd, 1875, he was the legal owner of the northwest quarter of the northeast quarter and the east half of the northeast quarter in section 22; also the northwest quarter of the northwest quarter of section 23; and, also, the northwest quar-

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ter of the northeast quarter of section 13, all in township 44, range 33, in Cass county, Missouri. That afterwards said Thomas McKean and his wife, Eliza, conveyed said real estate to the other defendant, Thompson McKean, without consideration, for the purpose of defrauding the creditors of the said Thomas. That afterwards, January 26th, 1881, execution on the judgment aforesaid was sued out, levied on said land and sold, and Elizabeth S. Bowen, one of the plaintiffs, became the purchaser, and received a deed from the sheriff. And pray to have the deed to Thompson McKean declared void and fraudulent, and the title vested in plaintiff.

Eliza McKean, upon application, was made party defendant, and for her separate answer said in 1854 she received from her mother's estate \$100, with which she afterwards entered eighty acres of land in Iowa, subsequently sold the Iowa land for \$800, and got thereon \$40 interest; That that sale was made with the express understanding between her and her husband, that the proceeds should be invested in land in Missouri, and the title taken in her name. That in pursuance of such agreement, her husband bought the land mentioned in the petition putting her money in it and a part of his own; but took the deed in his own name. That afterwards she joined with her husband in conveying it to the defendant, Thompson, her son, for the sole purpose of protecting her interest in the land; and asked the court to decree to her, her proportional interest in the land. This the court below did, and the plaintiff brings the case here by writ of error.

To sustain the issues on the part of plaintiffs, they read the note and \$18,000 judgment, deed from sheriff to Elizabeth S. Bowen, deed from Thomas and Eliza McKean to Thompson McKean, and a deed to Thomas McKean for the land; and various other conveyances of other real estate, and mortgages made by Thompson McKean to borrow money to pay debts of Thomas McKean, and debts for "running" the farm, tending to show that Thomas Mc-

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Kean was the owner of the whole, and that it was put in Thompson's name to cover it up from Thomas' creditors. Evidence was, also, introduced tending to show that at the date of the sale to Thompson McKean, there were no deeds on record in Cass county showing that Thomas McKean held the legal recorded title to any real estate whatever.

Defendants then offered evidence tending to show Eliza McKean's entry and sale of the Iowa land for \$800, that she sold her interest in her mother's estate for \$100, and invested it in the eighty acres bought from the United States, and then introduced Thomas McKean as a witness, who testified positively as to the agreement with his wife; that he did receive the \$800 from her and invested it, with some of his own, in the land, and took the deed in his own name; that he and his wife conveyed the land to one Morris, the wife's brother, who re-conveyed to him, Thomas, which deed was not put on record, and that they conveyed to this son, Thompson McKean, so as to secure the wife's interest, but did not then explain to Thompson the object of the conveyance to him. This witness was subjected to a long and searching cross-examination, and it must be confessed that he did not make the transaction as satisfactory as it might have been. But this evidence was not controverted, except by circumstances arising principally from various tax receipts and assessments, and deeds and mortgages offered in evidence in rebuttal by the plaintiffs.

The case was tried by the court, who had the main witnesses before him on the witness stand, subjected to a searching cross-examination, where he could observe their demeanor and manner of testifying; and with the whole case before him, came to a conclusion. That conclusion was to the effect that the deed to Thompson McKean was voluntary and in fraud of the creditors as far as Thomas McKean was concerned; but that the wife, Eliza McKean, had an interest therein, derived from means of her own, which came from her mother's estate, and to which she was entitled in her separate right. Under the facts in this

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case, it is clear that Eliza McKean would be entitled in her own right to have such portion of the land as the amount of her money paid thereon may bear to the whole sum paid. "Lands conveyed to one, but purchased with funds advanced for the purpose by another, are held by the grantee in trust for the latter." *Buck v. Swazey*, 35 Mo. 41; *Bumgartner v. Guessfeld*, 38 Mo. 37. In *Baker v. Vining*, 30 Me. 121, it is said: "If two or more persons pay the purchase money for land, and it clearly appear how much each paid, a trust estate would arise to each, respectively, *pro tanto*." The same doctrine is recognized in *Thompson v. Renoe*, 12 Mo. 157; *Lyon v. Akin*, 78 N. C. 258; *Rhea v. Tucker*, 56 Ala. 450; *Botsford v. Burr*, 2 Johns. Ch. 405; *Tebbetts v. Tilton*, 31 N. H. 282, and *Pembroke v. Allentown*, 1 Foster 107, where it is said that: "If only a part of the purchase money is paid by a third party, there will be a resulting trust in his favor *pro tanto*." *Sheldon v. Sheldon*, 3 Wis. 703.

In the case at bar the evidence tends to show that the wife had \$840, arising from the sale of her real estate, which she gave to her husband with the agreement that he should invest it in land in Missouri in her name. He bought the land but took the title in his own name. Under this state of facts there can be no doubt about the law. The court below having found these facts, this court is not called upon to weigh the evidence very nicely, but will assume the facts to be as found below.

The judgment of the court below is, therefore, affirmed. All concur.

Beggs v. Fowler.

BEGGS V. FOWLER *et al.*, Appellants.**Contract for Personal Employment, Construction of: DISMISSAL.**

Defendants employed plaintiff to buy hogs for them, the terms of the contract being contained in a letter to him written by a member of defendants' firm, and which stated "We accept your offer of a twelve months' engagement at \$100 a month, subject to your giving us satisfaction. I may say that the hogs you have bought for us have given satisfaction;" *Held*, that defendants could not terminate the contract before the end of the year, except for inefficiency or unfaithfulness of plaintiff in the discharge of the duties of his employment.

Appeal from Jackson Circuit Court.—HON. TURNER A. GILL,
Judge.

AFFIRMED.

Karnes & Ess for appellants.

When a contract for service, although for a term, is determinable by either party when they become dissatisfied, it may be ended by either at any time whether there be cause for dissatisfaction or not. Under such a contract a party is not bound to assign a cause for terminating the contract. Wood on Master and Servant, pp. 262, 263; *Provost v. Harwood*, 29 Vt. 219; *Rossiter v. Cooper*, 23 Vt. 522; *Whitcomb v. Gilman*, 35 Vt. 297; *Evans v. Bennett*, 7 Wis. 404; *Durgin v. Baker*, 32 Me. 273; *Davenny v. Shattuck*, 9 Daly (N. Y.) 66; *Spring v. Ansonia Clock Co.*, 24 Hun (N. Y.) 175. By the terms of the contract the defendant reserved the right to terminate it if plaintiff did not give satisfaction.

Jas. F. Mister for respondent.

Where a master improperly dismisses a servant, he is bound to make compensation for the damages sustained by the latter. 2 Addison on Cont., (Morgan's Ed.) § 895; 2 Parsons on Cont., (5 Ed.) 40, 41. It is a question for the

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jury whether the employer has acted *bona fide* in the dismissal, and ought reasonably to have been satisfied with the work. *Nearns v. Hurbert*, 25 Mo. 352; *Lewis v. Atlas, etc., Ins. Co.*, 61 Mo. 534. The measure of damages is how much the plaintiff has lost by defendants' breach of the contract. Authorities last, *supra*; *Pond v. Wyman*, 15 Mo. 183; *Everson v. Powers*, 89 N. Y. 527. The finding of the court was clearly right and substantial justice was done. The instructions asked and given for plaintiff are justified by all the authorities. *Davis v. Brown*, 67 Mo. 313; *Bowling v. Kinz*, 55 Mo. 446; *Cameron v. Watson*, 40 Miss. 191, 209; *Etting v. Bank of United States*, 11 Wheat. (U. S.) 59; *Copeland v. Copeland*, 28 Me. 525, 543; *Branch v. Doane*, 17 Conn. 403; *Noyes v. Shepherd*, 30 Me. 173; *Brown v. Bowen*, 30 N. Y. 520; *Foster v. Railroad Co.*, 84 Ill. 164. The contract was a mutual one for a year, and could be terminated only by the expiration of that period, or by mutual agreement, or by discharge or dismissal upon legal grounds, justifying such action.

NORTON, J.—This suit was instituted to recover damages for an alleged breach of contract. The evidence shows that defendants entered into negotiations with plaintiff to employ him to buy hogs, which culminated in a contract the terms of which, so far as this case is concerned, are embraced in the following writing:

“ATCHISON, KANSAS, January 10, 1880.

“MR. A. E. BEGGS:

“*Dear Sir:* Your letter received, and we are disposed to accept your offer of a twelve months' engagement at \$100 a month, subject to your giving us satisfaction. I may say that the hogs you have bought for us have given satisfaction. Your engagement to commence on Monday first. I expect to get you a pass to travel over the Kansas City & Council Bluffs road; also, some of the other roads. For the present I suppose Kansas City will be your best place, and you will have our instructions daily. If receipts

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are large on Monday, we may want ten or more loads purchased.

I am, yours truly,

GEORGE FOWLER."

The evidence shows that on receipt of this letter he went to buying hogs, and continued till the 18th of June, 1880, when he received the following communication :

"ATCHISON, KANSAS, June 18, 1880.

"A. E. BEGGS :

"*Dear Sir :* Your favor received. We shall not need your services after the 1st of July. We are,

ANGLO-AMERICAN PACKING CO.,

By GEORGE FOWLER."

The plaintiff then offered evidence tending to show that he was a skillful buyer of hogs, was faithful in the discharge of his duty as such buyer, and that he was discharged without cause, the bill of exceptions stating that the evidence was preponderating that plaintiff was a skillful and efficient buyer. The defendants offered evidence tending to show that plaintiff did not give satisfaction as a buyer. On this state of facts the court below tried the case on the theory that under the contract defendants could not terminate the employment of plaintiff for one year, during the year, on the mere ground of dissatisfaction with him as a hog buyer, unless such dissatisfaction arose from some good and substantial reasons; that is, that plaintiff did not properly, efficiently and faithfully discharge the duties of his employment. The defendant objected to instructions given embracing the above theory, and to the refusal of the court to give instructions asked by him embracing the theory that defendants had a right to discharge plaintiff at any time upon their being dissatisfied, although there was no cause for dissatisfaction.

We are of opinion that the court tried the case upon the correct theory, and rightly construed the contract. It will be observed that immediately after the phrase in the contract "subject to your giving us satisfaction" the fol-

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lowing words occur: "I may say the hogs you have bought for us have given satisfaction." We think the plaintiff was justified from the connection in which these words are found in construing the contract to mean that if he continued throughout his term, to do as he had done in the past, faithfully, skillfully and efficiently to buy hogs, that defendants would be satisfied. If they are not to be understood in this sense, they have no meaning. If the words referred to had not been employed, the case might then have fallen within that class of cases to which we have been cited by defendants' counsel, of which the case of *Provost v. Harwood*, 29 Vt. 219, is a type; or have come under the operation of the principle laid down in *Wood on Master and Servant*, p. 263, where it is said: "When a contract, although for a term is determinable by either party when they become dissatisfied, it may be ended by either at any time, whether there is any cause for dissatisfaction or not. Under such a contract a party is not bound to give a cause for terminating the contract."

Judgment affirmed, in which all concur.

GOLDSBY v. JOHNSON *et al.*, Appellants.

The Decree of the lower court setting aside a conveyance of land as being in fraud of creditors, affirmed.

Appeal from Chariton Circuit Court.—HON. G. D. BURGESS,
Judge.

AFFIRMED.

L. H. Waters and J. C. Crawley & Son for appellants.

The court erred in permitting Willis H. Johnson's deposition to be read against appellants while the witness was

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then present in the room. R. S. 1879, § 2157. The court erred in permitting a part of Willis H. Johnson's deposition to be read; plaintiff should have read the whole of it. *Hill v. Sturgeon*, 28 Mo. 323; *Kritzer v. Smith*, 21 Mo. 296. The decree of the court was not supported by the evidence. A court of equity, except in a case where the evidence is clear and conclusive, should not take from one man a large and valuable estate, as in this case, worth \$4,000, and bestow it upon a stranger who purchased for \$28. *South v. Oliver*, 40 Ill. 245; *Elliott v. Stoddard*, 98 Mass. 145; *Shoulz v. Brown*, 27 Pa. St. 123. When a suit to set aside a conveyance, as in this case, is brought by a subsequent creditor, fraud in fact must be clearly proven. As long as a creditor does not contemplate defrauding any one, he may dispose of his property as he sees fit. *Payne v. Stanton*, 59 Mo. 159; *Pepper v. Carter*, 11 Mo. 540; *Salmon v. Barnett*, 1 Am. Lead. Cases 49; *Read v. Livingston*, B. John. Ch. 501; 2 Story's Eq., §§ 355, 366; *Vogler v. Montgomery*, 54 Mo. 577. At the time the deed was made, Willis H. Johnson owed his father \$2,700. After it was recorded the father paid the county mortgage for \$440.75, Hill's debt of \$600, Jackson's debt of \$300, and the debt due Redman's estate of \$190. He paid everything but the Munson debt, of which he heard for the first time after plaintiff had bought the land for \$28. The court below should have offered him an opportunity to redeem.

S. P. Huston and *A. W. Mullins* for respondent.

Willis H. Johnson made no answer, and the fraud on his part, therefore, stands admitted. *Shend v. Henley*, 71 N. Y. 320. His failure to testify as a witness raises against him a strong presumption of fraud. Bump on Fraud. Con., (3 Ed.) 54; *Baldwin v. Whitcomb*, 71 Mo. 685; *Henderson v. Henderson*, 55 Mo. 559. A conveyance from son to father when the son is indebted, calls for strict proof of good faith and the payment of the purchase price. *Glen v. Glen*,

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17 Ia. 498; 94 U. S. 580; *Stevens v. Dillman*, 86 Ill. 233. The omission to place the deed of record or leaving it in the hands of the grantor, to be produced or suppressed, as exigencies may require, is a fraud. Bump on Fraud. Con., (3 Ed.); *Coates v. Gulach*, 44 Pa. 43; *Hood v. Brown*, 2 Ohio 267; *Everleigh v. Penford*, 2 Wood & Rob. 539; *Brown v. McDonald*, 1 Hill Ch. 297. After this pretended sale the vendor remained in possession of the land as W. O. Johnson himself says: "My son lived on and occupied and used the land after he conveyed it to me just as he had before." This rendered the pretended sale fraudulent. Bump on Fraud. Con., (3 Ed.) 49; *King v. Moon*, 42 Mo. 551. During this time he mortgaged to Chariton county. *McIntosh v. Bathune*, 8 Ired. 139; *Swift v. Lee*, 65 Ill. 336. The motion for a new trial does not assign error in admitting or rejecting evidence; hence, that could not be assigned here. But even if it could the action of the lower court is clearly sustainable on authority. *Morris v. Brunswick*, 73 Mo. 256.

NORTON, J.—The petition in this case was filed in September, 1880, and charges in substance that on the 27th day of October, 1877, defendant, Willis Johnson, became indebted to Anna Munson, administratrix of the estate of Wm. Munson, deceased, in the sum of \$302.90; that Willis was then occupying the land and credit given to him on account of such apparent ownership; that, after the creation of this debt on the 10th day of January, 1878, a deed from Willis H. Johnson to his father, Wm. O. Johnson, purporting to convey this land, was filed for record, which deed was dated March 6th, 1876; that it was secretly and collusively made by an arrangement between father and son to defraud existing and future creditors of said Willis H. Johnson; that after the pretended making of the deed from son to father, the former mortgaged the land to Chariton county, representing it to be his own with the knowledge of the father. This mortgage is dated March 30th,

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1876. The petition then alleges that suit was brought on the Munson note; an attachment issued in aid of it upon the ground that defendant, Willis H. Johnson, had fraudulently conveyed and assigned his property and effects, and had concealed, removed and disposed of his property and effects so as to hinder and delay his creditors; that personal service was had and judgment rendered thereon in the name of William Bitter, administrator *de bonis non*; the land levied upon and sold as the property of Willis H. Johnson, and purchased by plaintiff and deed made to him. The prayer of the petition is, that said deed from Willis Johnson to William O. Johnson be set aside.

Defendant, Willis Johnson, did not answer, but made default. William O. Johnson filed his answer denying the material allegations of the petition.

Upon the trial of the cause judgment was rendered by the court for plaintiff in accordance with the prayer of his petition, from which the defendant has appealed, and assigns as reason for the reversal of the judgment that the finding is against the evidence.

As to defendant, Willis H. Johnson, the fraudulent purpose for which the deed in controversy from him to his father was made, stands confessed, and if the father, William O. Johnson, had knowledge of this purpose, and accepted the deed with such knowledge, it is void as to creditors, even though he may have paid a consideration for the property conveyed; and the fact that Willis H. Johnson, the grantor and son, was present in court, when the cause was tried, as the record before us shows, and was not called by him to testify, under the ruling of this court in the case of *Baldwin v. Whitcomb*, 71 Mo. 651, raises a presumption in favor of the charge of fraud. The presumption thus raised is abundantly fortified by the evidence in the case, and passes from a mere presumption to a fact proved.

The evidence shows that, although the controverted deed from the son to the father was dated and acknowledged on the 6th of March, 1876, that it was not filed for record till

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the 10th of January, 1878; that in the meantime the son, according to the evidence of the father, lived on and occupied the land as he had before, and according to the evidence of Mr. Doxey, defendant, William O. Johnson, told him in May, 1877, more than a year after the date of the deed, that the land belonged to Willis, his son. In addition to this, the evidence shows that the debt which culminated in the judgment under which the land was sold to plaintiff, was contracted in October, 1877, with Anna Munson, administratrix, and concerning which Mr. Slyster testified as follows: "I live adjoining this land, have lived there for years; was acting as the agent of Mrs. Munson at the time Willis Johnson bought the stock. Willis always claimed the land and used it as his own. I would not have delivered the property if I had not believed he owned the farm; his father was there frequently in 1878, spoke of the farm as Willis' farm; told me the farm was his; had a conversation with Wm. O. Johnson one year ago, in which he said he did not get the deed from his son till 1878."

McCalvin testified: "Was at Willis' frequently while he lived on the land; he always claimed the land; he built a large barn on it and a new dwelling house in 1877 and 1878. I saw his father then frequently in 1878. He spoke of the farm as Willis' farm. Willis was considerably in debt in 1878; he left the farm in 1878."

It seems to be an established principle that "a deed not at first fraudulent may become so by long being concealed, because by its concealment persons may be induced to give credit to the grantor. In such a case the use that is made of it relates back, and shows the intent with which it was made. The omission to place a deed on record, or leaving it in the hands of the grantor, or placing it in the hands of a third person to be produced or suppressed as exigencies may demand, are instances of secrecy that are within the rule." Bump on Fraud. Con., p. 82. Applying the principle here announced to the facts disclosed by the evidence, the trial court was justified in the judgment rendered by

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it; for it abundantly appears that, if in fact the deed in controversy was executed in March, 1870, it was not only not put on record till January, 1878, after the debt to Mrs. Munson was created, but that in the meantime the grantor remained in possession as before, claiming the land as his own, obtaining credit on the strength of his claim, which claim was not only known to the grantee, but the validity of the claim recognized by the grantee in repeated declarations that the land was in fact the land of his son, the grantor.

The evidence of defendant, William O. Johnson, who was examined as a witness in his own behalf, is contradictory and inconsistent with itself, and wholly fails to relieve the transaction of the imputation of fraud. It is as follows: "I am father of W. H. Johnson; I own the farm Willis moved on to in February, 1873; with four horses raised a big crop of wheat in 1873 and 1874; I furnished the capital, and were to divide the profits. In 1873 he raised 2,600 bushels of wheat, and in 1874 raised about 2,700 bushels; I sent him large sums of money; don't now recollect how much; we were partners in the stock business in 1873; he had ninety mules on the farm on our account; on the 15th day of September, 1874, I sold the farm to him for \$4,000; I made deed to him of that date, at that time; I had received money for the two crops of wheat; he had fed out what he raised on the farm to our stock; we had had no settlement; I suppose he had about paid me for the land; in March, 1876, he brought mules to Mexico for sale; I sold them for him; he asked me for money; I told him he was owing me and I should keep it; he said if I would pay him the money and allow him \$1,000 for the barn and house built on the land, he would deed me the land back; I agreed to it; he executed the deed to me March 6th, 1876, and acknowledged it on that day before recorder of Audrain county for the expressed consideration of \$5,000; his wife was not there to sign the deed; Willis told me he had not recorded his deed, and for this reason,

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and because his wife had not signed the deed, I did not have it recorded; I was waiting to get his wife to sign the deed; I rented him the farm at \$350 a year; about 1st of January, 1878, I was up in Chariton county, learned my son had had his deed recorded and borrowed money from the county and given a mortgage on the land, and had given chattel mortgage on his personal property; I went home, got my deed, had my attorney to make out attachment papers against him, came immediately back, had a settlement with him, found he owed me \$2,700, and I had my deed put on record as soon as I could get it after I found what he had done; I paid the county debt, also a debt of \$600 to Hill, \$300 to Jackson, \$190 to Redmon's estate; these debts were notes he had sent to me and I had signed as security, except the county debt; I never refused to indorse my son's notes, when requested, and would have indorsed the Munson note if it had been sent to me, but it was not; I knew nothing of the Munson debt until after judgment and the sale of the land; I have paid all of Willis' debts that I know of, except the Munson debt; Doxey and I owned 160 acres timber land jointly; was not divided till 1879; after the division Doxey wanted pay for timber cut off his part; I told him Willis cut the timber; the timber was cut before Willis deeded the land to me, and I told Doxey Willis would have to pay him for the timber; I had a conversation with Slyster; did not tell him deed was antedated."

Cross-examined: "I never paid anything to my son for his deed to me; he had not paid anything to me for this land; he gave me his notes; we just settled up and he conveyed the land to me; I did not know that he was involved in debt; I did not give in any notes given me by my son, for assessment in the tax list; do not know whether I took any notes from my son or not; I did not have any notes against my son, and did not deliver any notes to him when he conveyed the land to me; no money was paid; we settled and I took the land for what he owed me on ac-

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count; I kept a book account; do not know how much I credited him with in 1877 and 1878; occupied the land as my tenant; paid me rent; we had a written lease; don't know what became of the lease; it was written by me and signed by Willis. In 1878 I learned that Willis was largely in debt; I did not tell Mr. Slyster that the land belonged to my son, nor did I tell him I did not get my deed from Willis till 1878; I do not know whether I was insolvent or not, when I conveyed the land to my son; my son lived on and occupied and used the land after he conveyed to me, just as he had before; I was not insolvent in 1876, 1877 and 1878; I had given a deed of trust on my property for \$11,000; the conversation referred to by Mr. Doxey was in 1876, before I got the deed from my son.

It will be seen that defendant swears in his examination in chief that in consideration of his son's conveying him the land he was to pay him the money received from the sale of mules, and allow him \$1,000 for a barn then built, which, according to other evidence in the case, was not built till a year afterwards. On his cross-examination he swears that he never paid his son anything for the deed. He swears in his examination in chief that he had received the proceeds of 5,300 bushels of wheat raised in 1873 and 1874 by his son on the land, and made a deed to his son for the land in 1874, he having about paid for it; in his cross-examination he swears that his son never paid him anything for the land, but gave his notes; that he never delivered any notes to his son when the deed was made; "did not know whether he took any notes, no money was paid; we settled and I took the land for what he owed me on account." These conflicting statements cannot be reconciled. Besides this, he is contradicted in important particulars by three disinterested witnesses, and it was, also, shown by several witnesses that his character for truth was bad.

We perceive nothing in the record which would justify an interference with the judgment, and it is hereby affirmed, in which all concur.

HOLMES *et al.* v. BRAIDWOOD; HUISKAMP *et al.*, *Interpleaders*,
Appellants.

1. **Practice in Supreme Court: EVIDENCE: EXCEPTIONS.** The Supreme Court will not review the action of the trial court in admitting evidence, unless the bill of exceptions states the specific objection made to it, and clearly shows the fact or point in evidence which was the basis of the objection.
2. **Conveyance in Fraud of Creditors: EVIDENCE.** The acts and declarations of a debtor charged with the execution of a conveyance in fraud of creditors, made in the absence of the grantee, are admissible in evidence to prove the fraudulent purpose of the debtor.
3. ———: ———. Knowledge on the part of the grantee of such fraudulent purpose of the debtor, may be shown by any circumstances tending to show participation in the designs of the latter, and without proving the grantee's knowledge of particular acts and declarations so made by the grantor.
4. ———: PARTICIPATION IN BY GRANTEE. The mere knowledge of a creditor, who takes his goods in payment of an existing *bona fide* debt, of a desire and purpose of a debtor in making the sale to delay his other creditors, is not sufficient to invalidate the transfer. It must further appear that the creditor participated in the fraud, as that there was a purpose on his part, beyond the mere effort to collect his own debt, to aid the debtor in defeating or delaying his other creditors, or to protect the debtor as well as himself.
5. **Instructions: ESTOPPEL.** Appellant cannot complain of an error in an instruction given for the opposite party, when his own instructions contain the same error.
6. **Verdict: CLERICAL ERROR.** A clerical error, and which is harmless, in drafting a verdict, will be disregarded.

Appeal from Grundy Circuit Court.—HON. G. D. BURGESS,
Judge.

AFFIRMED.

Hagerman, McCrary & Hagerman for appellants.

The court erred in saying to the jury that if the Huis-kamps had knowledge of Braidwood's intent to defraud the conveyance was fraudulent. It was admitted that interpleaders were in good faith creditors. In such case a

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mere knowledge of a fraudulent intent on the part of the grantor does not avoid the conveyance. The grantee must participate in the fraud. This is the modern and now well settled rule. *Shelley v. Boothe*, 73 Mo. 74; *Kohn v. Clement*, 58 Ia. 589; *Anderson v. Warner*, 5 Ill. App. 416; *Butler v. White*, 25 Minn. 432; *Olmstead v. Mattison*, 45 Mich. 617. Knowledge of the vendee only avoids the transfer where there is a new purchase, and it cuts no figure where the transfer is to secure or pay debt. The suit was begun by George P. Holmes & Co.; the verdict was for George Holmes, and the judgment was for George P. Holmes & Co. This was unwarranted, as no substitution was made, and the question was directly raised by the motions for new trial and in arrest. The evidence offered by respondent, consisting of conversations between respondent's counsel and defendant's counsel, was inadmissible. Declarations of a grantor are only admissible on two grounds: That they are part of the *res gestae*, (Bump on Fraud. Con., (2 Ed.) 563,) or that it is explanation of the possession. *Ib.*, 569; Burrill on Assign., (4 Ed.) 613. These authorities show that the declaration must be made before the sale.

George Hall for respondents.

The instructions declared the law correctly. *Noble v. Blount*, 77 Mo. 235; *Blewett v. Railroad Co.*, 72 Mo. 583; *Stale v. Hopper*, 71 Mo. 425. Appellants cannot complain of an error in respondents' instruction which they helped to produce, and which is also contained in their own instructions. *Noble v. Blount*, *supra*; *Davis v. Brown*, 67 Mo. 313; *Leabo v. Goode*, 67 Mo. 126; *Ames v. Gilmore*, 59 Mo. 80. A conveyance which is void in part as being given to hinder, delay or defraud creditors, is void *in toto*. *Hyslop v. Clark*, 14 Johns. 464; *Werden v. Howes*, 10 Conn. 50; *Tickner v. Wiswell*, 9 Ala. 305; *Goodrich v. Downs*, 6 Hill 438; *Rosswell v. Winne*, 37 N. Y. 591; *Daugherty v. Cooper*, 77 Mo. 528. The alleged error as to the verdict is without

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merit. *Neil v. Dillon*, 3 Mo. 59. The court did not err in admitting the evidence offered by plaintiffs as to the conversation between the defendant Braidwood and plaintiffs' attorney. *Exchange B'k v. Russell*, 50 Mo. 531; *Burgert v. Borchert*, 59 Mo. 80.

PHILIPS, C.—This action was instituted in a justice's court. Plaintiffs brought action by attachment under which certain goods were seized as the property of defendant, Braidwood. Huiskamp & Bro., partners, interpleaded, claiming to be the owners of the goods. On trial had in the justice's court, the issues were found for the plaintiffs. Interpleaders appealed to the circuit court, where on trial *de novo*, the plaintiffs again obtained a verdict and judgment, from which interpleaders prosecute this appeal.

The evidence on the part of interpleaders tended to show, in fact it was admitted by plaintiffs, that at and before the date of the attachment Braidwood was largely indebted to interpleaders. The evidence of interpleaders further showed that said debtor, prior to the attachment, turned over said goods to them under a written bill of sale in payment of said indebtedness and for the benefit of one Mrs. Lambert, and that interpleaders had taken possession of the goods.

The evidence on the part of plaintiffs, so recites the bill of exceptions, "tended to show that the bill of sale was executed and the goods in controversy turned over by Braidwood to interpleaders with intent to hinder, delay and defraud his creditors, and that Huiskamp & Bro., interpleaders, had knowledge of such intent. Plaintiffs, also, introduced evidence tending to show that at the time their note, upon which suit was brought and writ of attachment issued against said defendant, Braidwood, was presented to defendant, Braidwood, for payment, which was before the sale of the goods to interpleaders; defendant, Braidwood, promised and agreed with Judge Hall, who represented said notes for plaintiffs, that he would advise with interpleaders,

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as they held the largest claim against him, and before he did anything further with his goods, let him know what interpleaders said concerning the payment thereof; that he, Braidwood, also, said that he did write a letter to interpleaders about the payment thereof, but that interpleaders made no reply thereto; that defendant did not advise plaintiffs that he had not heard from interpleaders before selling and transferring the goods to them. To this evidence interpleaders objected without avail.

I. The first error in the order of trial assigned by appellants is as to the competency of the statements made by Braidwood to plaintiffs. It is conceded by interpleaders that a part of this conversation was anterior to the sale of the goods by Braidwood to them, but they claim that a portion of it was subsequent thereto. That any portion of this conversation was subsequent to the sale, counsel for interpleaders admit is only inferable from the latter clause of this evidence, to-wit: "That defendant did not advise plaintiffs that he had not heard from interpleaders before selling and transferring the goods to them." This language is equivocal. It asserts merely a negative proposition that might well consist with the antecedent statement that interpleaders had made no reply to his letter before the sale. At all events, we hold that when a party thus complains of error in the ruling of the trial court his bill of exceptions should not only show the specific objection made, but the fact in evidence relied on as its basis should be so palpably brought out and preserved, as to make it obvious without strained and doubtful inference as to what the point and facts were before the court. Otherwise the trial court may pass on one matter or point and this court reverse for error on another. *Roussin v. Ins. Co.*, 15 Mo. 244; *Skinner v. Ellington*, 15 Mo. 488. An examination of the specific objections urged at the trial against the admissibility of this evidence, satisfies my mind of the correctness of the foregoing observation. The objections were:

1st, That it being a contract or conversation between

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defendant and plaintiffs' attorney, and not in the presence of interpleaders, they could not be bound or their interest affected by it. 2nd, That the defendant could not bind interpleaders by act or disclosures, not made in their presence or to their knowledge. 3rd, A part of said conversation being as to the contents of some writing, the writing itself was the best evidence, and until it was shown to be lost or some notice given to interpleaders to produce it, parol evidence could not be introduced as to the contents thereof.

No imputation was made upon any part of the statement as occurring subsequent to the sale, and no discrimination is made between such as occurred prior and subsequent. But the objection went to the whole statement on the broad and single ground that the interpleaders were not present nor consenting thereto. The evidence, we think, was admissible. It was certainly competent as against Braidwood, the common debtor. One of the issues, and an essential one involved in the inquiry, was the conduct, the motive, of Braidwood. Was the transfer made by him with a fraudulent intent towards his other creditors? His fraud was the initial step in the development of the plaintiffs' defense to the interplea. If the debtor was guilty of no fraud, the plaintiffs' cause was ended, regardless of the motive and conduct of the purchaser. True it is, the plaintiffs should follow up the proof of the debtor's fraud with evidence of the interpleaders' fraud in making the purchase of the goods; but the evidence to establish the two propositions may be different in kind and independent in source. "Evidence in regard to the conduct and fraud of the debtor, prior to the transfer, is admissible to prove the fraud on his part, and if this is proved the knowledge of it on the part of the grantee may be proved by any circumstances tending to show a participation in the designs of the debtor. The acts and declarations may be proved without proving knowledge on the part of the grantee, of the particular

acts and declarations from which the fraudulent intent is to be inferred. The competency of such evidence does not depend upon the time when the act was done or the declaration made. If the act or declaration is so connected with the main fact under consideration as to explain its character, further its object or to form in conjunction with it one continuous transaction, the evidence is admissible without regard to the time when the act was done or the declaration was made." Bump's Fraud. Con., (3 Ed.) 582, 583. As against the fraudulent grantor, his acts and declarations are always competent. *Hairgrove v. Millington*, 8 Kas. 480; *Gamble v. Johnson*, 9 Mo. 597. It may be conceded that the purchaser, under such circumstances, is entitled to a declaration from the court advising the jury of the proper limitation and scope of such evidence. But instead of this course the interpleaders, both in their objection to the testimony and their instruction, asked the court to wholly exclude it from their consideration for any purpose, unless interpleaders were present when the statement was made. The court, therefore, did right in refusing the declaration as asked. *Stowell v. Hazelett*, 66 N. Y. 635.

II. The following instruction, given on behalf of plaintiff, is complained of by appellants:

1. Although the jury may believe from the evidence that James H. Braidwood executed the bill of sale to Huiskamp & Bro., read in evidence, transferring to them the goods in controversy, and at the time of the execution of the same was indebted to the Huiskamp Bros., yet if they further find from the evidence that the same was executed for the purpose of hindering, delaying or defrauding said Braidwood's creditors, or any of them, with the knowledge or consent of said Huiskamp Bros., then the jury must find for plaintiffs.

The criticism now made upon the instruction is, that it authorized the jury to find the issues for the plaintiffs if they believed that Braidwood made the sale to defraud his other creditors, and interpleaders had knowledge thereof

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at the time of the transfer. The well settled law now is, that the mere knowledge of the creditor, who takes his debtor's goods in payment of an existing *bona fide* debt, of a desire and purpose of the debtor in making the sale to hinder and delay his other creditors, is not sufficient to invalidate the transfer. It must further appear from the facts or attendant circumstances of the transaction that the preferred creditor, in some way, participated in the fraud, as that there was a purpose, beyond the mere effort to collect his own debt, to aid the debtor in defeating, delaying, etc., his other creditors, or to protect the debtor as well as himself. *Shelley v. Boothe*, 73 Mo. 74; *Kohn v. Clement*, 58 Ia. 589; *Butler v. White*, 25 Minn. 432; *Bump's Fraud. Con.*, (3 Ed.) 582.

The instruction, therefore, standing alone would be bad. But there is another fact appearing in this record which, I hold, extracts the sting of the error, or at least neutralizes it. The interpleaders asked and the court gave the following instruction:

8. Although the jury may believe that James H. Braidwood, at the time of conveying the goods in controversy to interpleaders, did so with the intent to hinder, delay or defraud his other creditors, yet before the jury can find such conveyance was a fraudulent conveyance, they must find from the evidence that the interpleaders participated in or had knowledge of such fraudulent intention on said Braidwood.

The implied direction of this instruction to the jury was, that they could find for the plaintiffs if they believed from the evidence "that the interpleaders participated in or had knowledge of the fraudulent intent of said Braidwood." It is in the disjunctive; either participation in or mere knowledge of the debtor's fraud by the interpleaders, the jury are told, would vitiate the sale in question, and now interpleaders come here assigning for error of the court that it conceded to plaintiffs what they themselves invited the court to do. We had occasion in *Noble v. Blount*, 77 Mo.

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235, to pass upon a similar question. It was there held that a party cannot assign for error by objecting here "to a technical blunder which he waived on the trial by adopting the error." It is an apposite instance where, if ever, the maxim might be applied, *communis error facit jus*. As Parker, C. J., in *Slack v. Lyon*, 9 Pick. 65, said: The party "shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy."

It is manifest to my mind from a review of the trial, that both court and opposing counsel tried the case on the theory that it was enough to destroy the interpleaders' cause that it should be found by the jury that interpleaders had knowledge of the fraudulent purpose of the debtor. But neither party can be heard to demand a reversal for an error which he invited. The question was likewise presented for determination in *Walker v. Owen*, 79 Mo. 563, 568. There it was insisted that the judgment of the court below should be affirmed, notwithstanding improper instructions given at the instance of only one of the parties, because the record failed to show that plaintiff had adduced a perfect title as the basis of his right of recovery. But it was held that, inasmuch as both parties had tried the case on the theory of the sufficiency of the title adduced by plaintiff, the respondent "is not entitled to an affirmance of his judgment on a theory not tried below. It would be an act of gross injustice to plaintiff to affirm this judgment," says Winslow, C., "on a question that has never yet been decided in the court, when she was denied a recovery on the sole ground that the contract on which she relied was absolutely void because not signed by the defendant. Respondent must stand or fall in this court by the theory on which he tried and submitted his case in the court below," citing *Whetstone v. Shaw*, 70 Mo. 575.

III. We are, also, asked to set aside the verdict of the jury because there was not sufficient evidence of the fraud on the part of the interpleaders to sustain it.

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Cautious as the bench should ever be not to trench upon the province of the jury as triers of the facts, we cannot hesitate in this instance to decline the invitation of counsel where he has not preserved in the bill of exceptions the evidence in full. There is only a synopsis of the evidence with the statement that it tended to prove certain propositions.

IV. It is finally urged against the judgment that it does not follow the verdict of the jury. The plaintiffs to the action are entitled "George P. Holmes & Co.," whereas the bill of exceptions recites that the verdict runs thus: "We, the jury, find for the defendant in the interplea, George P. Holmes." But the verdict as copied in the judgment runs: "We, the jury, find for the defendant in the interplea, Geo. P. Holmes & Co.," and the judgment is accordingly entered up in the name of George P. Holmes & Co. Whether this is a partnership composed of two or more names, or the firm of a single person, is not disclosed. Be this, however, as it may, the imputed error or variance is manifestly a mere clerical error in drafting the verdict by the jury or the framer of the bill of exceptions. It was entirely harmless, so far as the interpleaders are concerned. It affects no substantial right of theirs and worked no injustice. As such it falls within the saving spirit of sections 3569 and 3582, Revised Statutes 1879.

It follows that the judgment of the circuit court should be affirmed. All concur.

PIERCE V. CHAMBERLAIN *et al.*, Appellants.

1. **Dedication: INTENTION.** Dedication of land to public use depends upon the intention of the owner, and whenever this intention is unequivocally manifested, the dedication is made, so far as the owner of the soil is concerned; and if accepted and used by the public in the manner intended, the dedication is complete, and the

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owner and all claiming in his right are precluded from asserting any ownership inconsistent with such use.

2. ——— : ———. The intention of the owners to dedicate in this case held to be clearly expressed.
3. **Practice in Supreme Court: VERDICT.** In a case where the evidence is conflicting, the Supreme Court will not disturb the finding of the trial court.

Appeal from Jackson Circuit Court.—HON. F. M. BLACK,
Judge.

AFFIRMED.

Jewell & Thompson for appellants.

(1) No statutory dedication is claimed, nor was there a common law dedication. As to what constitutes a common law dedication, see *Brinck v. Collier*, 56 Mo. 160; 2 Greenleaf on Ev., (13 Ed.) p. 591, § 662. (2) There was no acceptance; but the intention, more or less clearly expressed in deed to Holmes, was revoked. As to right to revoke, see 8 Minn. 494; 31 Cal. 589; 1 R. I. 519. (3) The evidence of revocation consists of the deed without reservation from Holmes to defendants, (as in Minnesota case cited,) also the unconditional warranty deed from Marty to defendants of twelve and a half feet in width of the land in dispute, given at a time when he and defendants owned the whole of the land through which Marty afterwards platted such street. Also payment of taxes, both by Holmes and subsequently by defendants to present time. As to effect of payment of taxes, see *Brinck v. Collier*, 56 Mo. 166.

J. W. Jenkins for respondent.

(1) There was a complete and entire dedication of the land for the street. The vital principle of dedication is the intention to dedicate, and when this is unequivocally manifested the dedication, so far as the owner of the soil is con-

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cerned, has been made. Angell on Highways, (2 Ed.) ch. 3, § 142, p. 146; 2 Greenleaf Ev., (13 Ed.) § 662, p. 591; *Brinck v. Collier*, 56 Mo. 160; *Missouri Institute, etc., v. Howe*, 27 Mo. 211; *Becker v. St. Charles*, 37 Mo. 14. A dedication may be made to take effect in the future. *Jersey City v. Morris Canal Co.*, 1 Beasley (12 N. J. Ch.) 547. No immediate acceptance by the public was necessary. *Rose v. City of St. Charles*, 49 Mo. 510; *Taylor v. City of St. Louis*, 14 Mo. 20. *Selectmen, etc., v. Dummer*, Spencer (N. J.) 106; *Jersey City v. Morris Canal Co.*, *supra*. No grantee is necessary in a deed of dedication. *Jersey City v. Morris Canal Co.*, *supra*; *Cincinnati, etc., v. White*, 6 Pet. 431. Both Holmes and Marty, by accepting the deeds containing the dedication, assented to such dedication, and they and their grantees are bound by it. *Jersey City v. Morris Canal Co.*, *supra*. (2) There has been no revocation of the dedication. *Jersey City v. Morris Canal Co.*, *supra*; *Selectmen v. Dummer*, *supra*.

NORTON, J.—This suit was brought to restrain defendants perpetually from obstructing a street. Judgment was rendered for plaintiff according to the prayer of the petition, from which defendants have appealed to this court, and the questions presented by the appeal are, whether the strip of ground claimed as a street had been dedicated by the owner, and if dedicated, whether the dedication had been accepted, and whether such dedication had been revoked before acceptance.

It appears from the evidence that in February, 1875, Mary S. Peery, Mary J. Bouton and Sarah A. Peery, who were the owners in fee of a tract adjacent, or near, to Kansas City, conveyed by deed to Robert J. Holmes a part of said tract, embracing said street, which was recorded in the recorder's office of Jackson county on the 9th of April, 1875. Following the granting clause in this deed are the following words: "We also grant, bargain and sell, convey and confirm, forty feet in width for the purpose of a street

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extending from Independence Avenue to the north line of the foregoing tract of land, except twenty feet in width and 546 in depth of the above tract of land which the said Robert J. Holmes grants, bargains and confirms for the purpose of being used as a part of said street; said street not to be opened so long as said lands through which said street passes may be used for cultivation; said street to extend on north and south line parallel with north and south line of above tract of land and along the east, north and south line of said tract of land." The Peerys and Bouton continued to be the owners of the remainder of the land adjoining and including said street until the 23rd day of September, 1878, at which time they conveyed the same to one Marty by warranty deed, which contained the following reservation: "Excepting a forty foot street through said land from north to south, beginning at Independence Avenue on the south line of said land at a point supposed to be the center of said south line, running thence north parallel with the section line dividing sections 33 and 34, twenty chains to the north boundary line of said land." On the 14th of June, 1879, said Marty, also, acquired by warranty deed from said Holmes all the residue of the land purchased by Holmes from the Peerys and Bouton, except what he had conveyed to defendants. On the — day of June, 1879, Holmes conveyed by deed of general warranty a part of said tract. On the 23rd of August, 1879, Marty filed in the recorder's office of Jackson county the plat of Marty's addition, on which the street in controversy is marked "Park Avenue."

The question as to whether the forty foot strip of ground, so far as it concerns the owners, was dedicated for a street, is dependent upon the fact whether such was the intention of the owners as "the vital principle of dedication is the intention to dedicate, the *animus dedicandi*, and whenever this is unequivocal'y manifested the dedication, so far as the owner of the soil is concerned, has been made. * * If accepted and used by the public in the manner intended,

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the dedication is complete, precluding the owner and all claiming in his right, from asserting any ownership inconsistent with such use." Angell on Highways, p. 146, § 142. We think it clearly appears by the deed from the owners to Holmes, dated February 6th, 1875, and the deed from the owners to Marty, dated September 23rd, 1878, that it was the intention of the owners to dedicate the strip of ground in question for the purposes of a street. The owner in the last deed referred to expressly excepted and reserved from the grant to Marty a forty foot street through said land from north to south.

Was this dedication accepted by the public? Upon this question the evidence is somewhat conflicting, some witnesses testifying that it had not been generally used as a street; others testifying that it had. The trial judge who had the witnesses before him found that the dedication had been accepted by the public, and with this finding we are not disposed to interfere, as the judge who tried the case was in a better situation than we are to determine what the real fact was in this conflict, as there is sufficient evidence in the record to sustain the finding.

It is claimed that the deed from Holmes to defendant revoked the dedication. We are of a different opinion, for the reason that the street if used and accepted by the public in the manner intended, the dedication was complete, and precluded the owner, as well as all claiming under him, from asserting an ownership inconsistent with such use. Besides this, the deed from the Peerys and Bouton to Holmes did not convey this strip of ground to Holmes, and for that reason Holmes' deed to defendants was inoperative, so far as the street in question is concerned.

We perceive nothing in the record justifying interference with the judgment, and it is hereby affirmed. All concur.

THE STATE V. CULLER, *Appellant*.

Practice, Criminal: JUROR, QUALIFICATION OF. One who has read the evidence taken before the coroner in a case of homicide, either as originally written or as printed in a newspaper, or who has read the evidence in a criminal cause on preliminary examination before a justice of the peace, and formed an opinion therefrom, in either case is, as matter of law, disqualified from serving as a juror in the trial of such cause. Such person can neither form one of the list of qualified jurors served on defendant before trial, nor one of the jury which tries the issue joined. NORTON and RAY, JJ., dissenting.

PER SHERWOOD, J.

1. **Criminal Law:** INSTRUCTION. An instruction on the law of self-defense, condemned as confused and misleading. HENRY, J., concurring.
2. — : SELF-DEFENSE, WHEN NOT ABROGATED. While one may not bring on a combat in order to wreak his vengeance on his enemy and shield himself behind the pretext of self-defense, yet where the quarrel is sudden, no felonious intent entertained, and no deadly weapon used by him at the outset, the right to defend his life against an assault with a deadly weapon still exists in his favor, and is not abrogated by reason of the fact that he began the sudden quarrel. HENRY, J., concurring.

Appeal from Putnam Circuit Court.—HON. ANDREW ELLISON,
Judge.

REVERSED.

On the trial of the cause the court gave, among others, the following instructions which are complained of by appellant:

6. The court instructs the jury that even though they should believe, from the evidence in the cause, that Deck first struck or assaulted defendant with a club, yet if they further believe from the evidence that the deceased and his family were in the peaceable possession of the milk lot, then they had a right to lay up the rail fence surrounding it. If, therefore, they believe from the evidence that Deck, on discovering that his fence had been thrown down, was in

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the act of laying up the same, and while so engaged defendant came up to him and interfered with his work by ordering him to desist, and threatening to assault him if he did not, and intending to do so, then Deck was justifiable in so assaulting defendant, if it was necessary to prevent his interference, and such assault affords no excuse for defendant in shooting deceased.

8. If the jury find from the evidence that defendant and deceased had a difficulty which resulted in the death of deceased, and that defendant commenced the difficulty, or brought it on by any willful and unlawful act of his, committed at the time, or that he voluntarily and of his own free will and inclination entered into the difficulty, then there is no self-defense in the case, and the jury should not acquit on that ground; and in such case it makes no difference how imminent the peril may have been in which the defendant was placed during the difficulty.

S. P. Huston and C. W. Bell for appellant.

The court erred in overruling defendant's challenges for cause to the jurors, Dillmer, Wells, Canby, Hargrave and Terrell. They stated on their examination that they had read the evidence taken before the coroner's inquest and had formed opinions therefrom. This absolutely disqualified them. The opinion was not formed from rumor nor newspaper reports, but on the sworn testimony. R. S. 1879, § 1897. In such case no purging can cure the disqualification. In the following cases the opinions were founded on rumor, and within the exception in section 1897, *supra*: *Baldwin v. State*, 12 Mo. 225; *State v. Rose*, 32 Mo. 355; *State v. Core*, 70 Mo. 491; *State v. Barton*, 71 Mo. 288. The case of the *State v. Walton*, 74 Mo. 271, is no authority for this case, and the same may be said about the *State v. Brown*, 71 Mo. 454. The court erred in giving the eighth instruction for the State, because there was no evidence of a mutual combat, or that defendant commenced

the difficulty. It, also, deprives defendant of the right of self-defense if he had entered into a mere assault, an affray or a battery. *Daniels v. State*, 10 Lea (Tenn.) 261; *Windon v. Comm.*, 79 Ky. 461. The instruction erroneously uses the word "difficulty." The court erred in giving the sixth instruction for the State.

D. H. McIntyre, Attorney General, for the State.

The jurors who had read the testimony taken before the coroner and formed an opinion therefrom, were not disqualified. R. S. 1879, § 1897; *State v. Walton*, 74 Mo. 270, and cases cited. There is no error in the sixth instruction given for the State. *State v. Brown*, 64 Mo. 373. And the eighth instruction for the State is a correct statement of the law of self-defense. *State v. Linney*, 52 Mo. 40; *State v. Underwood*, 57 Mo. 40; *State v. Ellis*, 74 Mo. 207.

SHERWOOD, J.—The defendant was indicted for the murder of one Wm. C. Deck by shooting him with a pistol. His only plea was self-defense, and there was evidence which fully supported that plea, as well as evidence of a contrary effect. Tried, he was convicted of murder in the second degree and his punishment assessed at forty years imprisonment in the penitentiary.

Three grounds are urged for a reversal of the judgment:

First—Overruling defendant's challenge for cause of certain members of the panel of forty from which the selection of jurors was made; one of such panel being one of the jurors who tried the issue joined.

Second—The giving of the eighth instruction on behalf of the State.

Third—Giving the sixth instruction for the State.

These grounds will be considered in their order:

I. Dillmer, one of the panel of forty, asked on his *voir dire* if he had formed or expressed an opinion as to the guilt or innocence of the accused answered "that he had formed such opinion from reading the evidence as published

in the papers taken before the coroner and that he had such opinion still." Thereupon asked by the court if he could try the case and render a verdict according to the law and the evidence regardless of everything he had previously read or heard of the case, answered he could. Asked, also, if he had any bias or prejudice for or against the prisoner, he answered in the negative, and the defendant's challenge was disallowed. Other persons summoned on the panel, Wells, Canby, Hargrave and Terrell, being sworn to answer questions, answered that "they had read the evidence taken before the coroner, and that they had formed an opinion from such testimony." Upon this the defendant challenged them for cause, whereupon similar questions, as heretofore mentioned, were asked and answered in a similar way, resulting in the defendant's challenge of them, also, being overruled.

Our statute is specific in its prohibitions that no accused party shall be required to make peremptory challenges until a panel of competent jurors is obtained. R. S., § 1,903; *State v. Davis*, 66 Mo. 684.

It is quite clear this statutory right of the defendant was denied him, so far as concerns those who "had read the evidence taken before the coroner." And Wells, one of these, was afterwards sworn on the jury that tried the cause. Section 1,897, R. S., provides "it shall be good cause of challenge to a juror that he has formed or delivered an opinion on the issue or any material fact to be tried; but if it appear that such opinion is founded only on rumor and newspaper reports, and not such as to prejudice or bias the mind of the juror, he may be sworn." The rule of the statute then is the absolute disqualification of every one offered for a juror who has formed or delivered an opinion on the issue, etc.; the *exception* is where such opinion is founded only on rumor or newspaper reports, and even the exception has no operative effect if they have been such as to prejudice or bias his mind. There can be no question, therefore, as to the absolute incompetency of those persons

who had "read the evidence taken before the coroner" and formed an opinion therefrom, either to form a portion of the panel of forty, or *a fortiori* to form a part of the jury which tried the issue joined as to the guilt or innocence of the accused.

It may be fairly assumed that the four persons mentioned—Wells, Canby, Hargrave and Terrell—had "read the testimony taken before the coroner," while that testimony was unpublished and in manuscript, and with equal fairness it may be assumed that Dillmer had read the same evidence after it had become readily readable in consequence of being published in a printed form. Was not Dillmer also disqualified in consequence of having formed an opinion founded on such a basis? The answer to this question turns upon another one: What are newspaper reports? I take it that if in interpreting these words we are to obey the statute in such cases made and provided; *i. e.*, that "words and phrases shall be taken in their plain and ordinary or usual sense" (R. S., § 3126), that we cannot be long at a loss for their true meaning. "Rumor and newspaper reports," if we apply the maxim *noscitur a sociis*, were intended to occupy in point of evidential force the same footing. If we look to the standards of our language rumor is found to be: "Flying or popular report; a current story passing from one person to another without any known authority for the truth of it." Webster's Dictionary. If next we turn to "report," we find it one of the synonyms of "rumor," another "hearsay," another "story;" so that when we couple the word "newspaper" with the word "reports" it would seem impossible to doubt the legislative meaning as being simply this: A rumor or current story printed in a newspaper. And the legislature must not be supposed to be either unmindful or ignorant of the meaning and of the slight value placed by the judiciary of this State on newspaper statements or reports. Speaking on this point McBride, J., in *Baldwin's Case*, 12 Mo. 223, said: "The information upon which the juror predicated his opinion

was derived from newspaper statements, which, of all other sources of intelligence, are the most uncertain and unreliable; gleaned as such matters are from streets and alleys, beer houses and oyster cellars of a large commercial city, and without any special pains being taken to ascertain the particulars of the affair." And the legislature must not be held ignorant of that other definition of newspaper reports, given by Lord Mansfield in *Wilkes' Case*, 4 Burrows 2562, where he speaks of "that *mandax infamia* from the press, which daily coins false facts and false motives." If a witness, present at the coroner's inquest, had related to one afterwards summoned on the panel the testimony as given orally before the coroner, and such an one had formed an opinion on the issue, can it be doubted that he would have been wholly disqualified under the very terms of the statute? Does the disqualification lessen because the same information comes through a medium more authentic, and, also, in a permanent and official form? Dillmer answers that he *read the evidence as published in the papers, taken before the coroner*. There is nothing to show, nor is there any reason to doubt, that this evidence was identical in every respect with that read by Wells and others. Such a publication is not, therefore, to be regarded as a mere "newspaper report," and Dillmer as much so as Wells was disqualified.

In the recent case of *State v. Stein*, 79 Mo. 330, one sworn on his *voir dire*, stated he had formed his opinion "from what purported to be the testimony of the witnesses before the coroner's jury;" and afterwards, with others in like situation, he was placed on the panel and this being assigned for error, this court, speaking through Norton, J., said: "It is unnecessary to note more particularly the action of the court in overruling defendant's challenge for cause to four jurors, on the ground that from rumor and newspaper reports, they had formed decided opinions, further than to say that the rule in reference to the competency of jurors is laid down in the case of *State v. Walton*, 74 Mo. 270, and that, in passing upon the competency of

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jurors, the rule should not be pushed beyond the limits therein prescribed." This language is sufficient to show that in the opinion of this court "newspaper reports" are not synonyms of a full and complete statement of the testimony published in a newspaper, and that in *Walton's Case* this court had reached the ultima Thule, beyond which judicial construction should not be permitted to pass. In *Walton's Case*, our latest adjudication on the point in hand, of the persons summoned as jurors and challenged for cause, one had read in the local papers what purported to be a substantial statement of the testimony given before a justice of the peace, and from this had formed and expressed his opinion; and another had also read those local papers and had received a substantial statement of the testimony from parties who were present at the hearing before the justice, and had formed and expressed an opinion. I concurred in the ruling made by a majority of the court in that case; a ruling which held those persons competent to serve as jurors. Since then I have examined with much care the ruling then made in connection with the statutory provisions above quoted, and feel now constrained to say that we went a great way in that case, further, possibly, than I would be willing to go again. But be that as it may, conceding the correctness of that ruling, that case is no authority for this one, and cannot be invoked to uphold the ruling made by the court below, touching the competency of the jurors mentioned, for one of them had read "the evidence as published in the papers, taken before the coroner," and others of them "had read the evidence taken before the coroner." Our statute expressly requires that the evidence of witnesses taken before the coroner, shall be reduced to writing and subscribed by them, and such evidence is to be returned by him before the court possessed of criminal jurisdiction. 2 R. S., § 5,145.

There can be no doubt, therefore, of the absolute disqualification of those who had read the evidence officially taken in the cause, whether as written down by the coro-

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ner, or whether as published in the newspapers. To rule otherwise is to rule the statute itself out of existence; to substitute for its plain and simple mandates the ever-varying discretion of each trial judge in the State; to add to the single exception named in the statute, numberless others, and to allow the oath of a juror that he can render a verdict according to the law and the evidence, to neutralize and overcome "a good cause of challenge," no matter on how firm a foundation such cause may be based; in short, to nullify the statute and trample its behests under foot. For the reason that each one of the persons mentioned was disqualified to form the panel or to sit on the jury, the judgment should be reversed.

II. Relative to the sixth instruction, given at the instance of the State, it is scarcely necessary to say more than this, that it is confused and unintelligible, and, therefore, well calculated to mislead the jury, and is, moreover, erroneous, if it declares the doctrine, which it seems to do, that Deck was authorized and justified in striking defendant with a club, notwithstanding defendant had done no act to prevent Deck putting up his fence, and that there was no self-defense in resisting such a dangerous blow.

III. Of the eighth instruction given on behalf of the State, it may be said that if, by the word "difficulty" is meant a mere altercation, wrangle, dispute or controversy confined to words and springing up on the spur of the moment, it does not state the law. Threats made by the defendant of interfering with the building of the fence or against the deceased, unless some overt act were done with a malicious and felonious purpose in view, would not take from the defendant the right of self-defense if the deceased first struck him with a club. *Daniel v. State*, 10 Lea 261. In that case Deaderick, C. J., observed: "The charge in this case holds in effect that a person who may, by improper conduct, provoke an assault, cannot be allowed to rely on the plea of self-defense, nor can he rely upon such defense if he willingly engage in a fight, even if first assaulted and

stricken. * * Provoking words and gestures might be used from heat of blood, in a sudden quarrel, and a fight might, under such circumstances, be engaged in, during which a party might have the right to defend himself from impending danger of death or great bodily harm." See, also, 1 Wharton Crim. Law, §§ 476, 477, 485.

If, however, provocation is sought for, if the party killed is purposely provoked or assaulted in order to afford an opportunity to slay him, and then when goaded to madness he makes an assault and is thereupon killed, then the rule announced in *State v. Hays*, 23 Mo. 287, applies. In that case the jury were properly told that if "Hays intentionally brought on the difficulty for the purpose of killing Brown," he was guilty of murder. The fifth instruction for the State recognizes this principle, which is conspicuously absent from the one under discussion. Were it the rule, as announced in the eighth instruction, then a person who, without any ulterior or malicious purpose should, on the street, begin some sudden wrangle, altercation or dispute, or be the aggressor in some casual combat without weapons or malicious purpose, the party assailed either with tongue or fist, could draw a deadly weapon and take his life, and he be defenseless before his adversary, or a murderer if he successfully resisted the murderous assault. Such a doctrine, in my opinion, is consistent with neither reason, humanity or law. And it is only when the wordy quarrel or the actual non-felonious combat is provoked by the commencer or aggressor in order to afford opportunity for him to kill his adversary, that the right of self-defense ceases, and the authority of *Hays' case* can successfully be invoked. This seems to be the view entertained in *State v. Christian*, 66 Mo. 138, for after citing the cases of *State v. Starr*, 38 Mo. 270; *State v. Linney*, 52 Mo. 40; *State v. Underwood*, 57 Mo. 40; and quoting from them in reference to a party who "seeks and brings on a difficulty," NORTON, J., says: "Where the combat is the immediate conse-

quence of a sudden quarrel, and not an act of deliberation or agreement, it might be different."

The result reasonably deducible from the authorities cited and quoted from seems to be this, that while you may not bring on a combat in order to wreak your vengeance on your enemy, and then shield yourself behind the pretext of self-defense, yet where the quarrel is sudden, no felonious intent entertained, no deadly weapon used by the accused at the outset, that there the right to defend his life against an assault with a deadly weapon still exists in his favor and is not abrogated by reason of the fact that he began the sudden quarrel.

Since writing the above, I have found a case which bears a close analogy to the present one. The case arose in North Carolina, a state where adjudications on the subject of murder are imbued with all the stern rigor of the ancient common law. In the case referred to, the defendant was convicted of murder in the first degree. He had been stabbed by the deceased, but he had "brought on the difficulty" by striking the deceased a blow with his fist, when the deceased stabbed him, and he thereupon stabbed and killed the deceased, but in circumstances which rendered it doubtful whether the act of the prisoner was the result of passion in consequence of being stabbed, or was necessary in self-defense, and Gaston, J., observed: "It was necessary that the jury should, in the first place, ascertain whether the prisoner commenced the affray with a pre-conceived purpose to kill the deceased, or to do him great bodily harm. For if he did, then there was nothing in the subsequent occurrences of the transaction, which could free him from the guilt of murder. If the first assault was made with this purpose, the malice of that assault, notwithstanding the violence with which it was returned by the deceased, communicates its character to the last act of the prisoner. * * If, upon consideration of all the evidence, the jury came to the conclusion that the first assault of the prisoner was not of malice prepense, then

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the subsequent occurrences demanded their careful consideration, because upon these the prisoner's guilt might be extenuated into manslaughter, or excused as a homicide in self-defense." *State v. Hill*, 4 Dev. & Batt. 491. This case fully supports and maintains the views I have hitherto expressed.

For the reasons heretofore given, the judgment should be reversed and the cause remanded. HOUGH, C. J., and HENRY, J., concur in the first paragraph of this opinion, and NORTON and RAY, JJ., dissent. HENRY, J., concurs, also, in the other paragraphs.

The judgment is reversed and the cause remanded on account of the error mentioned in the first paragraph.

NORTON, J., DISSENTING.—Not being able to concur in the opinion of a majority of the court, and believing as I do that the rule which it establishes will render an efficient administration of the criminal law difficult, if not wholly impractical in many cases, and is not in accord with the current of authorities, it is but proper that I should give my reason for dissenting.

I understand the rule established by the opinion to be: That it is a good cause for the peremptory challenge of a juror in a criminal case, if when examined on his *voir dire*, he states that he has read the evidence taken before a coroner or justice of the peace as reported in a newspaper, and has formed an opinion from such report, even though he declares that if accepted as a juror he would be wholly uninfluenced by such opinion, and would be governed solely by the evidence, and even though the court required to pass upon his competency should be satisfied of his impartiality, and that when such a juror is accepted it will be reversible error, although the facts of the case fully and completely sustain the verdict.

In the march of progress and civilization the fact is not to be ignored that in every county of the commonwealth there are one or more newspapers, and that, as a rule, they

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are read with avidity by all the citizens who can read, and that when a homicide is committed and an investigation is had the enterprising journalist publishes the facts with all attending circumstances, as shown by a preliminary examination, either before a coroner or justice of the peace, and that such accounts are sought after and read with eagerness, and it is just as impossible for the reader not to be impressed by it and not to have some opinion concerning it, as it would be to throw black ink on a white wall without coloring it. One of these results is produced by a law of the mind and the other by a law of matter. The legislature giving recognition to this law of the mind, expressly provided that opinions formed from such newspaper reports and rumors should not disqualify a person from being a juror, unless it should further appear that such opinion would bias his judgment and prevent him from trying the case impartially and according to the evidence adduced on the trial. The rule of exclusion, established by the opinion, utterly disqualifies all such readers from becoming jurors, and the result would be that the citizen charged with a crime would, of necessity, be compelled to have his cause submitted to a jury composed of the most ignorant class in the community, if the State should exercise its right of challenge.

In treating of this question Judge Scott observed, in the case of the *State v. Davis*, 29 Mo. 391, "that the jurors were examined on their *voir dire* and stated that they had formed an opinion from rumors, but it was not such as to bias or prejudice their minds. * * Such jurors have invariably been held competent, and the course of decision will not be varied because complaisant men, in a long course of cross-examination by counsel, may give an answer somewhat favorable to those who may wish to exclude them. Such is the growing aversion to serving on juries, that unless the rule is adhered to it will be impossible to obtain competent jurors." More than forty years ago, this court in passing upon the case of *Baldwin v. The State*, 12 Mo. 223, sustained the action of the circuit court in accepting as competent a

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juror who had formed an opinion from newspaper statements, and who also stated that he had no prejudice or bias on his mind, observed, through Judge McBride: "If, therefore, the question of competency is referable to the juror himself, he was competent; but it was not his province to pass upon that question; he could only state facts, and it was the duty of the court to decide whether according to the facts he was competent. In deciding this question the presiding judge at the trial, having the juror before him, witnessing the manner of his examination, possessing a knowledge of his character, is infinitely better qualified than we are to determine whether under all the circumstances his mind and feelings are in a condition which will enable him to discharge honestly and impartially his duty, as a juror. Where the juror qualifies himself under the statute and the presiding judge accepts him, this court cannot say an error has been committed."

In the recent case of *Reynolds v. United States*, 98 U.S., 145, it was observed: "That in these days of newspaper enterprise and universal education every case of public interest is, almost as a matter of necessity, brought to the attention of intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause, the court will be practically called upon to determine whether the nature and strength of the opinion formed are such in law as necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact—to be tried, so far as the facts are concerned, like any other issue of that character—upon the evidence. The finding of the trial court on that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court than those which govern in the consideration of motions for new trials, because the verdict is against the evi-

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dence. * * In such cases the manner of the juror while testifying is oftentimes more indication of the real character of the opinion than his words. * * Care should therefore be taken by a reviewing court not to reverse the ruling below upon such a question of fact except in a clear case." So in the case of *Ortwein v. Commonwealth*, 76 Pa. St., 414, when five jurors stated that they had formed opinions from newspaper accounts or rumors, or both, and that the opinion thus formed they still had, and that it would take evidence to remove their opinions, they were all held to be competent jurors, although one of them had formed his opinion from reading a newspaper containing a report of the evidence at the coroner's inquest. As distinguished a judge as Agnew, C. J., who delivered the opinion, said: "Much weight is to be given to the judgment of the court below in whose presence the juror appeared and by whom his manner and conduct, as well as his language, are scrutinized." The same doctrine is announced in the case of *Myers v. Commonwealth*, 79 Pa. St. 308, and *Curley v. Commonwealth*, 84 Pa. St. 151; *Balbo v. People*, 80 N. Y. 484, and *Cox v. People*, 80 N. Y. 500; also in Indiana, case of *Guetig v. State*, 66 Ind., 94; in Iowa, in case of *State v. Lawrence*, 38 Io. 51; in Illinois, 94 Ill. 299; in Florida, 9 Flor. 215; in California, *People v. Welch*, 49 Cal. 174; also in Mississippi, Alabama and Texas—in cases of *Ogle v. State*, 33 Miss. 383; *Carson v. State*, 50 Ala. 134; *Thomas v. State*, 36 Texas 315.

If, as the above authorities decide, the fact as to whether a juror who has formed an opinion from rumor or newspaper reports, and who states that such opinion would not bias his judgment, but that in the trial of the cause he would be governed solely by the evidence, is a competent juror is to be determined by the court in which the trial is had, and that the decision when made ought only to be disturbed on the same ground that would justify setting aside a verdict on the ground that it was not supported by the evidence. Under this rule, before the action of the trial

judge in deciding that, notwithstanding such opinion, the juror was competent, the evidence upon which he determined that fact must so preponderate against the finding as to induce the belief that his finding was the result of passion, prejudice or partiality; for this court has held in numerous cases, and it has long been the established law of this State, that even in criminal cases it will not interfere nor set aside the verdict of a jury when it is asked to be done on the ground that it is against the evidence, when there is any evidence to support it, or when the evidence so strongly preponderates against the verdict as to lead to the conclusion that it was the result of partiality or prejudice. "It is only when there is a total lack of evidence, or it fails so completely to support the verdict that the necessary inference is that the jury must have acted from prejudice or partiality, that we will attempt to relieve for that cause, even in a criminal cause." *State v. Cook*, 58 Mo. 546.

This principle is ignored in the opinion of the court. Under the construction therein placed upon the statutes, whenever it appears that the opinion of the juror has been formed from reading a newspaper report of the evidence taken before the coroner, he is disqualified as a matter of law, although it be made abundantly to appear to the trial court, from the evidence of the juror, his character and standing, his demeanor while delivering his evidence, that the opinion so formed was not such as to affect his impartiality in the slightest degree. This, in my view, is subversive not only of the best interests of social order, but of the best interests of those criminally charged. One of the jurors said he had read the evidence taken before the coroner reported in a newspaper, and four others that they had read the evidence taken, without further qualification, and what I have here written, has been on the hypothesis that all of them referred to the evidence as reported in the newspaper. An opinion formed from such newspaper reports stands upon the same footing, under our statute (even under the maxim *noscitur a sociis*) as one formed from rumor

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or hearsay, except in one case it is printed hearsay, and in the other spoken. It is just such printed hearsay which may form the basis of an opinion which the legislature intended should not disqualify, when it should appear to the court passing upon his competency, that such opinion would neither bias his judgment nor affect his impartiality.

The construction placed upon the statute would put it in the power of a person criminally charged to disqualify every person in a county from serving on a jury by simply having a newspaper to publish a report of the evidence taken before a coroner or a justice of the peace; place the paper in the hands of all subject to jury duty who could read, and have it read to those who could not read, and when the cause is called for trial, and the sheriff is required to summon a jury, he brings in platoon after platoon of an hundred each, till the whole population of an entire county subject to jury duty has been compelled to abandon their various vocations and pursuits and appear before the court to be peremptorily challenged and sent home on the ground that they had formed an opinion from a newspaper report of the evidence taken before a committing magistrate or coroner, the prisoner thus escaping a trial and ultimately obtaining his discharge because a jury cannot be found in the county competent to try him. Just in proportion to the enormity of a crime, committed under circumstances the most revolting, shocking the community and the moral sense of mankind, are the probabilities increased of bringing about such a state of things. In my view of it, it was such a condition of things that the legislature was guarding against and intended to prevent when it was declared by statute that an opinion formed from newspaper reports should be no cause for challenging a juror when it appeared to the trial court that the opinion would not bias his judgment nor influence him in the trial of the cause. In the views herein expressed RAY, J., concurs.

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PHILIPS V. BAILEY *et al.*, Appellants.

1. **Deed of Trust: SALE: TENDER.** A tender before sale of the interest due without the principal, is sufficient to prevent a sale by a trustee under a deed of trust, although the latter provides that, in case of failure to pay the interest as it becomes due, the entire debt, principal and interest, shall mature, and the property be sold to pay the same.
2. — : **TAXES: DEFAULT: SALE.** Where a deed of trust provides that the debtor shall pay the taxes on the property conveyed, and in case of default in that regard, the debt, principal and interest, shall mature and the property be sold to pay the same, the trustee, on the payment before sale of the taxes, should not sell.
3. **Insurance. CESTUI QUE TRUST: DEFAULT.** Where a deed of trust provided, that the debtor should keep the property insured, but the creditor retained, for that purpose, out of the loan a sum sufficient to pay the insurance during the period of the loan, and the debtor did not learn of the failure of the creditor to effect the insurance until after the property was burned; *Held*, that the debtor was not in default as to such insurance.
4. **Deed of Trust, Stipulations of: ATTORNEY'S FEE.** An attorney's fee stipulated in a deed of trust to be paid out of the proceeds of the sale of the property to pay the debt, cannot be demanded before sale.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON,
Judge.

AFFIRMED.

Comingo & Slover for appellants.

(1) The evidence excluded by the court was both relevant and competent. It tended to rebut any inference of fraud as alleged that could possibly be made from other facts given in evidence. (2) A court of equity will not relieve against the stipulations or covenants contained in a contract except on the ground of fraud or mistake in consequence of which such stipulations or covenants are entered into. *Sloat v. Bean*, 47 Ia. 60; *Malcolm v. Allen*, 49 N. Y. 448; *Bennet v. Stevenson*, 53 N. Y. 508; *Heath v. Hall*, 60 Ill.

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344; *Brownlee v. Arnold*, 60 Mo. 79; *Wapples v. Jones*, 62 Mo. 440; *Noell v. Gaines*, 68 Mo. 651. (3) The covenant to pay the taxes, and the stipulation that in default of so doing the whole debt should become due, is valid. *Stanclift v. Norton*, 11 Kas. 218, 222. And so is a covenant to insure. 1 Jones on Mort., § 78. Stipulations for the payment of a reasonable fee of an attorney or solicitor, is valid and binding. *Rice v. Cribb*, 12 Wis. 179, 185; *Hitchcock v. Mossick*, 15 Wis. 522; *Pierce v. Kneeland*, 16 Wis. 672, 678; *Robinson v. Loomis*, 51 Pa. St. 78; *Weatherby v. Smith*, 30 Ia. 131; *Clawson v. Munson*, 55 Ill. 394.

Gates & Wallace for respondent.

There was no default on respondent's part at the time of the sale. The payment of the January interest to W. H. Bunn was a valid payment. *Brooks v. Jameson*, 55 Mo. 505. Where there is a default in the payment of interest, and by the terms of the deed of trust the principal then becomes due, it becomes due only for the purposes of the sale, and when the interest is paid or tendered, then the principal is no longer due. *Morgan v. Martin*, 32 Mo. 438; *Mason v. Barnard*, 36 Mo. 384; *Whalen v. Reiley*, 61 Mo. 565. The respondent was not in default either as to attorney's fees or the taxes. *Thornton v. Bank*, 71 Mo. 232; *Eitelgeorge v. Association*, 69 Mo. 52. Property worth not less than \$1,600, was sold *en masse* for only \$560.50. This alone would be sufficient to set aside the sale. *Vail v. Jacobs*, 62 Mo. 130; *Stoffle v. Schroeder*, 62 Mo. 147.

RAY, J.—Respondent filed this bill in equity in the circuit court of Jackson county, Missouri, to set aside a certain sale and deed executed thereunder by appellant, Bailey, to his co-appellant, the First National Bank of Pleasant Hill, Missouri.

He alleges therein, in substance that he is the owner of the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section 33,

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township 47, range 30, Jackson county; that on July 2, 1877, he and his wife executed a deed of trust, conveying said land to one Powell, as trustee, to secure the payment of a bond in the trust deed described and the interest coupons thereto attached; that said bond was for \$600 payable five years after date, bore interest at the rate of nine per cent, payable semi-annually; * * that said Bailey is the sheriff of Jackson county and was authorized by said trust deed to act as trustee in case of the absence from the State of Powell the trustee therein; that the National Bank of Pleasant Hill, his co-defendant, is a corporation organized under the laws of the United States; that he negotiated the loan evidenced by said bond with one Bunn, of Warrensburg, Missouri; that he received from him, the money so borrowed; that he delivered the deed of trust and said bond to him; that he paid the interest coupons, as they became due, to him, and that at the time of the sale, under the deed of trust, of which he complains, he had paid all interest then due on said bond, and all taxes due on the bond described in the deed of trust; that the First National Bank of Pleasant Hill, one of the defendants, and one Theodore Stanley, conspiring to cheat and defraud him out of his said property, claimed to have purchased said bond and coupons; and without his knowledge, and while he was temporarily absent from this State, caused his said property to be advertised for sale, by defendant Bailey, as trustee, under said deed of trust; that the day of sale was fixed for the 25th of January, 1880; that in order to avoid litigation, he, plaintiff, before said sale, tendered to said Bailey all the costs of advertising said sale, and all trustee's legal charges, and all interest then due on the coupons attached to said bond, that the said bank and said Stanley claimed to be due, although he had paid the same to said Bunn; that defendant Bailey, under the direction of said Stanley and said bank, refused to receive the amount thus tendered, and demanded that said bond and all interest then due, and the costs of advertising, and the trustee's charges and

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attorney's fee of \$50 be then paid, and that upon plaintiff's refusing to comply with the demand, said Bailey proceeded to sell under said deed of trust, and that said bank was the only bidder, and became the purchaser at said sale; and that plaintiff, at the time of and before the sale, gave notice of the facts above stated, and forbade the sale. Plaintiff insists that the interest on said bond is usurious; asks that there be an accounting between plaintiff and defendants, and that the sale be set aside.

Defendants filed answer to this petition, admitting the execution of the trust deed by respondent; also, the date and maturity of the bond and the rates of interest as given; also, that there are stipulations in the trust deed in substance as stated in the petition. That Bailey was sheriff as stated; that the First National Bank is a corporation; that Bailey, by direction of said bank, sold said land under said trust deed and that said bank became the purchaser thereof. The answer then denies all other allegations in the petition. As a further defense it sets up that it was stipulated in said deed of trust in case of default in the payment of the bonds or coupons at the time, in the manner, and at the place specified, or in case of non-payment of taxes or neglect to procure or renew insurance on the property it should be lawful for the trustee or his successor on the application of the legal holder of said bond or coupons, * * to sell the property * * and to execute a deed of conveyance therefor and to apply the proceeds of sale first, to the payment of the expenses of advertising, selling and conveying said property, including also the sum of \$50 for an attorney's fee and second the amount then due on said bond and coupons and third, the residue to be paid to respondent; that in default of any of the payments of principal or interest, or of a breach of any of the covenants or agreements contained in said deed of trust, the whole of the sum thereby secured, with interest to the time of sale, should become due and payable; and the premises in said trust deed described, might at once be sold in the same

manner and with the same effect as if said bond, by its terms had matured.

That on January 12th, 1880, said Bunn, for value received, indorsed and delivered said bond to defendant, the First National Bank, and said defendant thereby became the legal owner and holder thereof, and of the coupons attached thereto; that plaintiff failed to keep and perform the stipulations and covenants in said deed of trust contained, in that he failed and neglected to pay the interest coupon which became due on the 2d day of January, 1880. And failed and neglected to pay the taxes for the years 1878 and 1879, or either of said years, at the time they became due or any time thereafter, as required by the covenants in his said deed of trust; and failed to insure, or cause to be insured, said property as required; that by reason of the breaches of said covenants and agreements said bond, and all interest then due, became due and payable, and it became and was lawful for defendant, said National Bank, as the owner and holder of said bond and coupons, to cause said property to be sold; that said Bailey, pursuant to the terms and provisions of said deed of trust, did, on the 25th day of February, 1880, at the court house door in the city of Independence, sell at public vendue, to the highest and best bidder for cash, the said real estate, and that at said sale and bank became the purchaser, at and for the price and sum of \$560.50, and received a deed therefor; that the expenses attending the sale and transfer of said real estate as aforesaid, amounted to \$97.50, leaving a balance of \$462.50, which was applied as a credit on said bond, as required by the terms of said deed of trust.

In reply to this answer, plaintiff states that at the time he made the loan mentioned in the petition, Wm. H. Bunn, from whom he effected said loan, retained from the amount borrowed by plaintiff, sufficient money to pay the insurance on the buildings erected on the premises, and agreed to have the same insured; that sometime in the fall of 1879

said building was destroyed by fire ; that plaintiff believed that said Bunn, through whom he effected said loan, had insured the building, and so believed until after it was destroyed ; that on inquiring of said Bunn, he learned that he had failed and neglected to have it insured, and that said Bunn afterwards refunded to plaintiff the money he had obtained for the purpose of effecting said insurance. All the other allegations of the answer are denied.

To this reply there was no demurrer or motion to strike out.

There is little, if any, conflict about the material facts, which are in brief as follows: In 1877 respondent was the owner of two forty acre tracts of land in Jackson county, situated about five miles from Pleasant Hill, Missouri ; fifty acres of it were in cultivation and the balance was timber land, and was worth \$20 per acre, or \$1,600 in all. In December, 1877, he, through one Wm. H. Bunn, of Warrensburg, Missouri, borrowed \$600, and to secure the payment of same executed deed of trust on the above described premises. The deed of trust was dated back to July 2nd, 1877, and interest charged and collected from that date, Phillips actually receiving only \$507 of the \$600, the \$93 being retained for expenses, interest, commissions and for sufficient to insure the dwelling house on the premises for five years. The interest on the \$600 became due and payable semi-annually, viz: 2nd of July and January of each year; the principal became due and payable on the 2nd day of July, 1882. All the transactions were had with Wm. H. Bunn, at Warrensburg, who was acting as the agent for his brother, T. J. Bunn, to whom the bond was made payable. His brother was making a good many loans of this kind in that section at that time, and he, Wm. H. Bunn, did all the business and collected and forwarded the interest on them as they became due.

The taxes on the property in the deed of trust described, were not paid for the years 1878 and 1879 at the time they became due and payable. For each of said years

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they were paid by respondent on the 10th of February, 1880, about fifteen days before the sale. The property had not been insured, but respondent had permitted Wm. H. Bunn to retain out of the amount borrowed a sum sufficient to insure the property and for that purpose, but said Bunn neglected to effect an insurance, and the property was destroyed by fire in October, 1879, and some time after the amount retained for insuring the property was by said Wm. H. Bunn returned to respondent's attorney. The respondent did not know it was not insured until after the house was burned. Respondent paid promptly all the interest coupons that fell due before the 2nd of January, 1880. At that date he was under arrest and confined in jail at Kansas City, Missouri, on a charge on which he was afterward tried and acquitted. When released he paid to said Bunn the interest due January 2nd, 1880. This Bunn received and receipted for February 2nd, 1880. Eight days afterward, viz: February 10th, 1880, he learned his land was advertised for sale under the deed of trust, and on that day, when he went to see the sheriff, who was acting as trustee, to see if the sale had been countermanded, he learned for the first time that appellant, the National Bank, was the owner of the bond.

The president of the bank testified "that he bought the bond about the middle of January, 1880; that he made inquiry for it and bought it; that he received it about the date of its transfer to the bank, a few days thereafter; that he did not notify plaintiff he had bought it; that he did not make a demand on plaintiff for the January interest before he advertised the land for sale, and that he never asked plaintiff for any interest on said bond; that he sent it to the bank's attorney at Independence, soon after he received it; that he did not buy it with the intention to foreclose it as soon as he bought; that it is the only bond of the kind the bank ever bought." On the day of sale, and before sale, the respondent, by his attorney, E. P. Gates, tendered to the sheriff the interest due January 2nd, 1880,

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the costs and expenses of the advertisement and the sheriff's commission, all that was claimed to be due except the principal of the bond, \$600, and an attorney's fee of \$50. The sheriff, under the directions of the president of the bank, refused the tender unless the latter were also paid, and then proceeded to sell the property, and the bank bought the same at the price of \$560.50, and received a deed therefor.

Upon the trial defendant offered its president as a witness to show that plaintiff's father was indebted to the First National Bank of Pleasant Hill; that he (plaintiff's father) had promised to pay the debt out of the land in controversy in this cause, and had afterwards fraudulently conveyed the property to plaintiff and plaintiff's brother; that he, witness, and other officers of said bank believed that said conveyance to plaintiff and his brother was fraudulent and void as to creditors and proposed to take steps to expose the fraud and subject the land to the payment of the debt contracted by plaintiff's father with the said bank. Which testimony the court excluded as irrelevant and incompetent. To the exclusion of which defendants at the time excepted. The court found the issues for the respondent and entered up a decree accordingly, and appellants, after unsuccessful motions to set aside the finding and for new trial, bring the cause here by appeal.

It will be seen, therefore, that the bank purchased the bond and coupons about the middle of January, 1880, advertised the property for sale January 24th and forced the same to sale February 25th. The sale was had under a deed of trust to secure a bond whose principal was not due until July, 1882. The tender made by respondent on the day of sale which included all interest due, costs of advertising, commissions, etc., was refused, because it did not, also, include the principal of the bond and the attorney's fee of \$50. This tender should have been accepted by the sheriff who was acting in place of the trustee, and the sale stopped. The respondent had paid the interest promptly

until the installment of January 2d, 1880, fell due. He was then under arrest and in jail at Kansas City on a charge of which he was acquitted on the trial. After his release and without notice of any change in the ownership of said bonds and coupons attached he paid this January interest to Wm. J. Bunn to whom all the payments of interest had been regularly made and with whom the loan was negotiated and who was the brother of Thos. J. Bunn to whom the bond was made payable. Wm. Bunn receipted therefor in his brother's name and sent it to his brother February 2nd, who received it and this was the last known of it. What effect or consideration should be given to this payment, as the bank had purchased the bond prior thereto and on January 12, 1880, is not necessary to be now determined, for this interest was included in the tender made by respondent on the day of sale. If we are to be controlled by the exact letter in the covenants of the trust deed the evidence may be held to show a technical default on the part of respondent as to the payment of the taxes and the January interest, for they were not paid when due as thereby required.

The taxes, however, were all paid February 10th, 1880, and the January interest tendered as already said. It was provided in the trust deed that in the event of a breach of its covenants the whole of the principal and interest to the time of sale should at once become due and the property sold in like manner and effect as if the bond by its terms had matured. In the case of *Whelan v. Reiley*, 61 Mo. 565, the trust deed therein involved contained covenants similarly harsh and stringent to those before us. The difference attempted to be shown by appellant's counsel between the two instruments, is we think, rather subtle and is not material and substantial. In that deed it was provided that, in case of default in the payment of any of the interest notes, etc., then the whole debt secured should become due and payable, etc. There was in that case a default in the payment of a portion of the interest notes when due

and a tender to the trustee before sale of an amount sufficient to pay costs and the matured interest notes and a refusal thereof by the trustee, unless the principal note was, also, paid. It was there said that the default in the payment of the interest notes was cured by the tender made and that, therefore, the payment of the principal should not have been demanded. With this view and result we are well satisfied. The reasoning and principles announced in that case cover and control the important questions in the one now before us.

Nor do we think the respondent was bound to tender the sum of \$50 as an attorney's fee. It had not, under the provision of the trust deed itself, become due. It was to be paid out of the proceeds of the sale as a part of the expenses of such sale. It did not even become due by virtue of any default in any of said payments, or a breach of any of said covenants nor upon the mere advertisement of the property, but was a sum to be collected as a part of the expenses only when there was in fact a sale and conveyance of the property.

Nor do we think there was, under the pleadings and evidence, any such breach of the covenant in the trust deed to procure and renew the insurance as should in equity declare the whole sum thereby due and justify a sale of the property. As we have already seen when the loan was made, Wm. J. Bunn acting for his brother, Thos. J. Bunn, reserved and retained from the money borrowed a sum sufficient to pay the insurance for five years, the whole period of the loan, which he agreed so to apply, but which he neglected to do, as he himself testifies, and respondent did not know that the building was not insured until after it was destroyed by fire in October, 1879; of this there is no conflict in the testimony. This was one of the demands of the lender and was enforced and the amount deducted to enhance the security by insurance on the house to the amount of \$500. To the evidence in this behalf there was no objection at the trial. The policy was, also, upon request,

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to be assigned and delivered to the holders of the debt as collateral security, although the property was worth about three times the debt. Wm. Bunn acted for his brother generally in effecting many similar loans. His action in this transaction has been confirmed, ratified and approved in all other respects and the benefits and proceeds thereof held and enjoyed. As he was manifestly authorized to make such deductions and in fact did so, we think, under the circumstances of this case, the consequences of his neglect in the complete performance of this duty undertaken upon adequate consideration should not be further visited upon the respondent to the harsh and extreme extent of declaring that the principal of said bond has become due and his property subject to sale, for said alleged breach to procure insurance. To do so under the undisputed facts of this case would savor of such oppression as to warrant its refusal. 61 Mo. *supra*, 565.

We, also, approve the court's action in refusing to admit the testimony offered and the reasons assigned therefor by the court are satisfactory to us. The evidence was incompetent and irrelevant and had no material connection with the inquiry in progress before the court. As we find no error in the case we affirm the judgment. All concur.

CASPARI V. THE FIRST GERMAN CHURCH OF THE NEW JERUSALEM, *Appellant*.

Equity: GIFT: UNDUE INFLUENCE. A gift, disproportioned to her means, made by an aged widow, of a note payable to her, to a church, at the solicitation of its pastor, who was, also, her spiritual and business adviser, and without disinterested advice from others upon the condition, which the deed of gift omitted to recite, that she was to receive the interest on the note during her life, will, at her suit in equity, be set aside.

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AFFIRMED.

Kehr & Tittman for appellant.

Advice, persuasion or entreaty does not constitute undue influence, and will not vitiate a gift made freely and from conviction of its propriety, though such gift might never have been made but for such advice, persuasion or entreaty. *Howe v. Howe*, 99 Mass. 99; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 394; *Breck v. Breck*, 66 N. Y. 144; *Zimmerman v. Zimmerman*, 23 Pa. St. 375; *Joe v. McCord*, 74 Ill. 44; *Sutton v. Sutton*, 5 Kas. 459; *McDaniel v. Crosby*, 19 Ark. 533. There was in this case no other degree of confidence or influence between the plaintiff and the pastor, than the ordinary relation which exists between the pastor and every member of his congregation. A rule of presumption which may be wise when applied to gifts made upon a sick-bed, or in immediate anticipation of death, cannot be applied here. The plaintiff, though aged, was in fair health and in full possession of her mental faculties. Up to the time of the death of Gustav Morgens, he was her adviser. She at all times had the assistance and advice of friends. The presumption of undue influence is disproved by the facts of the case. The interest clause was left out of the deed of gift by her consent; the obligation, if any, is, therefore, a moral and not a legal obligation. But treating it as a legal obligation, the failure to comply with the promise does not avoid the gift. *McKane v. Bonner*, 1 Bailey 113; *Fonty v. Fonty*, 44 Ind. 133; *Long v. Woodman*, 58 Mo. 49, 53; *Hazlett v. Burge*, 22 Ia. 535; *Gallagher v. Brunell*, 6 Cow. 346; *Gage v. Lewis*, 68 Ill. 616; *State v. Pruther*, 44 Ind. 287; *Schaeffer v. Muenchen*, 7 Mo. App. 563. It is well settled law that a deed of trust or mortgage of personalty, may be void in part and valid in part. *State to use of Voullaire v. Tasker*, 31 Mo. 445; *State*

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to use of *Decker v. D'Oench*, 31 Mo. 453. A statute may be valid in part and void in part. *Co. Ct. St. Louis Co. v. Griswold*, 58 Mo. 175, 199; *State ex rel. Woodson v. Brassfield*, 67 Mo. 348. Mrs. Caspari having induced the defendant to consummate the purchase of the new church building by the gift of the \$4,000 note, which thereby became an asset of defendant, upon which it might properly rely, and did rely, in purchasing the church, it is a detriment to defendant to permit the plaintiff now to withdraw this asset, and hence plaintiff is estopped from questioning the gift.

Breck. Jones for respondent.

This case falls within the principles decided in the following cases: *Garvin v. Williams*, 44 Mo. 465; s. c., 50 Mo. 206; *Harvey v. Sullens*, 46 Mo. 147; *Cadwallader v. West*, 48 Mo. 483; *Yosti v. Laughran*, 49 Mo. 594; *Street v. Goss*, 62 Mo. 229; *Rankin v. Patton*, 65 Mo. 411; *Bradshaw v. Yates*, 67 Mo. 221; *Ford v. Hennessy*, 70 Mo. 580; *Miller v. Simonds*, 5 Mo. App. 33; s. c., 72 Mo. 669. The presumption of undue influence is stronger in the case of a minister of religion than in any other of the confidential relations. *Norton v. Relby*, 2 Eden 286; *Huguenin v. Basely*, 14 Ves. Jr. 299. This presumption throws upon the donee the burden of showing by the clearest evidence that the gift was the spontaneous act of the donor's own unbiased mind and flowed from a free and uninfluenced volition. *Harvey v. Sullens*, 46 Mo. 147; *Cadwallader v. West*, 48 Mo. 502; *Garvin v. Williams*, 50 Mo. 206; *Greenfield Estate*, 14 Pa. St. 489, 504; 1 Story's Eq., § 311; 2 White & Tudor's Lead. Cases in Eq., 1119. The presumption of fraud is intensified by secrecy and the improvidence of the gift, false recital of consideration, absence of a power of revocation and withholding of disinterested advice. It matters not that the pastor did not receive the benefit of the gift. Whoever received it took it infected with the undue influence and imposition of the person procuring it. *Yosti v. Laughran*,

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49 Mo. 599; *Rankin v. Patton*, 65 Mo. 387; *Ford v. Hennessy*, *supra*, where the point is fully discussed. When fraud or undue influence is shown to have been the moving cause for any part of a gift, the court will not go into vulgar fractions to see what part, if any, is good, but will set the whole aside. *Phillipson v. Kerry*, 32 Beav. 637; *Brown v. Kennedy*, 33 Beav. 133; *Turner v. Collins*, 7 L. R. Ch. App. 342. The acquiescence or ratification of the donor is of no importance while her situation remains unchanged. *Hatch v. Hatch*, 9 Ves. Jr. 292; *Bridgeman v. Green*, 2 Ves. Sr. 627; 2 White & Tudor's Lead. Cases Eq., 1263, and cases cited.

NORTON, J.—This suit was brought to set aside a gift made by plaintiff to defendant of a note for \$4,000 on the ground that the gift was obtained by fraud. The circuit court rendered judgment for plaintiff from which defendant appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, from which judgment defendant has appealed to this court.

A careful examination of the evinence shows that it establishes the following facts: that the pastor of defendant church was the spiritual and business adviser of the plaintiff, and that she had the utmost confidence and trust in him; that plaintiff was an aged and feeble widow and sought advice in regard to her temporal and spiritual affairs from the pastor; that the gift was disproportioned to her means; that it was obtained through the solicitation and active participancy of the pastor; that he drew the deed of gift to the note; that it was then copied by his wife in order that it might not appear in his handwriting, lest it might excite suspicion as to the validity and fairness of the transaction; and the fact that she was to receive interest on the note during her life was not incorporated in the deed for the same reason, and that she did not have competent and disinterested advice.

The above facts being established brings the case within

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the principles announced in the cases of *Garvin v. Williams*, 44 Mo. 467; *Cadwallader v. West*, 48 Mo. 502; *Rankin v. Patton*, 65 Mo. 378; *Bradshaw v. Yates*, 67 Mo. 221; *Ford v. Hennessy*, 70 Mo. 580, and justify the judgment rendered by the circuit court. The case is reported in 12 Mo. App. 293, where in an exhaustive opinion rendered by Thompson, J., affirming the judgment of the circuit court, the evidence is fully and fairly stated at great length and the authorities supporting the judgment appropriately referred to.

Judgment affirmed, in which all concur.

GREEN *et al.*, *Executors*, v. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Condemnation Proceedings:** TITLE: RAILROADS. In proceedings to condemn land for a right of way for a railroad, until the assessed damages are paid to the owner by the railroad company, the title remains in the owner.
2. ———: ———: ———. In condemnation proceedings, where the exceptions of the land-owner to the report of the commissioners are sustained and a new hearing granted, the payment into court by the railroad company of the damages assessed, will not divest the owner of the title. Upon the allowance of his exceptions, the owner's right to the money so paid is gone, and the parties are referred to the result of a second assessment and report by commissioners and the judgment of the court thereon.
3. **Landlord and Tenant:** LEASE: NOTICE TO QUIT: ESTOPPEL: EJECTMENT. Where a railroad company in proceedings to condemn land for a right of way pays the damages assessed to the circuit clerk for the owner, but upon allowance by the court of the latter's exceptions, voluntarily withdraws the money and enters into an agreement with the owner whereby it leased the land from the latter for a term of years, with stipulation to quit upon notice given, the relation of landlord and tenant is thereby created, and the railroad company is estopped to deny the landlord's title and right of possession. And if the stipulated notice to quit is given, the owner has a right of action to recover possession, either under the landlord and tenant act, or by ejectment.

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4. —: FORECLOSURE: SALE: RIGHTS OF PURCHASER: POSSESSION. Where the relation of landlord and tenant exists between parties, and the landlord's right of possession is taken away by foreclosure and sale under a deed of trust, the purchaser at such sale succeeds to the rights of the landlord, and on the expiration of the lease may maintain an action for possession of the premises.
5. **Practice in Supreme Court:** EVIDENCE. Objection to the admission of evidence cannot be made for the first time in the Supreme Court.
6. **Contract:** ESTOPPEL. A party cannot enjoy the fruits of a contract through a series of years, and then be heard to repudiate its obligations.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

E. A. Andrews and Robert Adams for appellant.

(1) On this record Zeitingner & Zoppi could not maintain ejectment or trespass; then how can a purchaser under a deed of trust do so for the breach of a contract made by the grantors in said deed of trust subsequent to such deed of trust, but long prior to a forfeiture thereof? *Baker v. Railroad Co.*, 57 Mo. 265; *Provolt v. Railroad Co.*, 57 Mo. 256, and 69 Mo. 633; *Hubbard v. Railroad Co.*, 63 Mo. 68; *Evans v. Railroad Co.*, 64 Mo. 453; *Kanaga v. Railroad Co.*, 76 Mo. 205. (2) Plaintiff must be presumed to have dealt with the land in controversy with full knowledge of the rights which the railroad had acquired, the act incorporating it being a public act. Acts 1849, p. 219; *Davis v. Railroad Co.*, 3 Am. and Eng. R'y Cases, 543. (3) The railroad company by constructing its road over the land in question acquired such right of entry and possession as to bind subsequent purchasers, and hence plaintiff cannot maintain ejectment. *Davis v. Railroad Co.*, 1 Sneed 94; *Verder v. Railroad Co.*, 15 Shands (S. C.) 476; *Sams v. Railroad Co.*, 15 Shands (S. C.) 484; *Trenton, etc., v. Chambers*, 9 N. J. Eq. 471; *Railroad Co. v. Baldwin*, 103 U. S. 474. (4) The action of the court in sustaining the exceptions of Zeitingner

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& Zoppi to the report of the commissioners had no effect whatever upon the right of possession by the railroad. Acts 1849, p. 219, § 10; 101 Ill. 402. (5) The lease read in evidence conveys no interest in the land to plaintiff, for the reasons, 1st, At the time of the execution of the lease the railroad company had, by appropriate proceedings, obtained the right to construct, and had constructed, its road over the land, and D. R. Garrison, its president, had no power to limit, restrict, modify or destroy that right. 2nd, If there was any right under the lease to maintain an action of ejectment or for damages, it remains in Zeitinger & Zoppi, and did not pass under the deed of trust. *Davis v. Railroad Co.*, 3 Am. and Eng. Railway Cases 543; *Brown v. Co. Com. of Essex*, 12 Metc. 481; *Tenbrook v. Jakke*, 77 Pa. St. 392; *Toledo, etc., v. Hunter*, 50 Ill. 325; *Pomeroy v. Railroad Co.*, 25 Wis. 64; *Haskell v. New Bedford*, 103 Mass. 208; *McLendon v. Railway Co.*, 54 Ga. 293.

R. E. Rombauer for respondents.

PHILIPS, C.—This is an action of ejectment instituted in the circuit court of St. Louis for the recovery of a small strip of ground, thirty feet in width across the north half of lot A in Eiler's survey of Carondelet.

This lot belonged to Zeitinger & Zoppi who were partners. In 1872 the Pacific Railroad Company, desiring to run a branch road to or through this ground in order to reach a manufacturing establishment in Carondelet, instituted proceedings to condemn this strip to its use. Commissioners were accordingly appointed to assess the damages who duly made their report to the proper authority. The company paid the amount of this assessment to the clerk of the circuit court and entered upon the work of constructing this branch or spur over the lot in question. Zeitinger & Zoppi filed their exceptions in due time to this report and on the 17th day of December, 1873, the court sustained the exceptions and set aside the report. The

railroad company thereafter withdrew the money so deposited. On the 27th day of April, 1874, the parties came to an adjustment and settlement of the whole matter, which was expressed in a written compact, then entered into between them, duly acknowledged and put to record in said county, by the terms of which the company paid to Zeiting & Zoppi the sum of \$1,025 in full satisfaction of all claims for compensation, or damages which they or either of them had, or might have, against the said company, by reason of the trespass and entry upon said land, and the construction of said road thereon; and in consideration of the premises said Zeiting & Zoppi leased and demised said strip of land to the company for its use, etc., from that date until March, 1875, and until the expiration of notice of ninety days to quit. It is further stipulated that at the expiration of the said lease, the company should be permitted to remove said railroad from said strip, and said Zeiting & Zoppi were to let the company, at its option, have, for the term of ten years from the expiration of said first lease, another strip of ground near this in controversy for the use of its railroad upon the terms, therein specified.

It is conceded that Zeiting & Zoppi gave the company the stipulated notice to quit and the proof showed that this notice had been repeated. In May, 1873, Zeiting & Zoppi executed a deed of trust upon said land, in favor of one Gay, to secure the payment of money borrowed by them from said Gay. This deed of trust was foreclosed and the property sold thereunder on the 28th day of February, 1877, to one Casey, who received the proper deed therefor. On the same day Casey conveyed by deed said lot to one Withnell who since died, leaving a will by which the legal title to said property was vested in the plaintiffs, as trustees or executors. There were other facts in evidence on the trial but they are not material to the proper consideration of the questions involved in this controversy. There were no exceptions saved on this trial. The court found the issues for the plaintiffs and rendered judgment

accordingly. Defendant appealed to the court of appeals where the judgment of the circuit court was affirmed *pro forma*, and the defendant prosecutes this appeal.

I. It is insisted by the appellant that the plaintiffs acquired no greater title than Zeitinger & Zoppi had, who could not have maintained the action of ejectment against the railroad company because the company originally entered into the possession of the land as a railroad corporation, under the provisions of its charter under condemnation proceedings. We do not feel called upon in the determination of this case to decide whether or not the action of ejectment would lie in the absence of the written agreement of April, 1874. It is enough to say, that notwithstanding the action taken by the railroad company for the condemnation of this land the title in fee to the land remained in Zeitinger & Zoppi. Until the assessed damages are paid by the company to the land owner the title continues in him. *Walther v. Warner*, 25 Mo. 277; *Provolt v. C., R. I. & P. Railroad Co.*, 57 Mo. 261. The payment into court of the assessment made by the first commissioners did not have the effect to divest the title. The statute, as well as defendant's charter, gave to the land owner the right to object to this first report, and to have a new hearing upon the amount of his damages. Upon filing his exceptions and their allowance by the court his right to that money was gone and the *status* of the parties would then be referred to the result of the second assessment and report by commissioners and the judgment of the court. Until the company should pay the amount of such second assessment of damages it would acquire no right to the land paramount to that of the citizen. Otherwise the private property of the citizen could be taken for a quasi-public use without compensation to him. *Evans v. Railroad Co.*, 64 Mo. 453; *Provolt v. Railroad Co.*, 69 Mo. 633.

But whatever rights either of the parties to the condemnation proceedings acquired thereby, they saw fit, for a valuable consideration, by way of adjustment and com-

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promise of the whole controversy between them, to abandon those rights and substitute a new relation. The company voluntarily withdrew from the court the money deposited by it. By withdrawing it, it abandoned any right secured thereby, and in lieu of the protection and rights, whatever they were, inhering in that proceeding, the written compact of 1874 was made the arbiter, and to that this issue must be submitted. As the land owner could not go back on that adjustment and contract to demand any other or further damages of the company for its trespass and appropriation of his land, no more can the company in this contention fall back on its charter and the condemnation proceedings instituted thereunder. By that compact the railroad company recognized the ownership of Zeitinger & Zoppi of this land and leased it from them for a specified time. This unquestionably established between them thereafter the relation of landlord and tenant, and estopped the defendant from denying its landlord's title and right of possession. The stipulated notice to quit was given and this, beyond cavil, gave them a right of action to recover the possession, either under the landlord and tenant act or by ejectment.

II. It is next contended by the learned counsel for the company, that although Zeitinger & Zoppi may have had such right of action under the lease, it remains in them and did not pass to those claiming under the deed of trust. We are cited in support of this proposition to a number of authorities. But they decide only the well recognized principle that the damages occasioned by a wrongful entry upon and injury to the freehold do not pass to the subsequent purchaser of the land. But that is not this case. The plaintiffs stand as purchasers at a foreclosure sale under the deed of trust given in 1873. As we have already demonstrated, the legal title, the fee, to this land was then in the mortgageors, Zeitinger & Zoppi. It may be conceded for the sake of this argument that the mortgagee took it *cum onere*, subject to the condemnation proceedings and

rights of the railroad company thereunder secured, whatever they were. This, at most, was but a burden upon a conditional interest in the land. When that burden, that interest, was removed by the act of the mortgageor and the company the benefit enured to the mortgagee. Had the railroad company wholly abandoned the land and removed its road therefrom would any one pretend that the whole title to this land would not have passed to the purchaser under the deed of trust? Even an after-acquired interest or title of a mortgageor, where the mortgage contains the usual covenant of title, enures to the benefit of the mortgagee. *Hitchcock v. Fortler*, 65 Ill. 239; *Bybee v. Hageman*, 66 Ill. 519; 2 Jones on Mort., 1656.

On the expiration of the lease to whom in this instance would belong the right of action for possession, if not to the purchaser under the deed of trust? The landlord could not maintain it, for his right of possession was taken away by the foreclosure and sale. If the purchaser under the deed of trust cannot maintain it, the logic of defendant's position is that it may hold perpetually another's land without having the title or right to the title, or any compensation therefor to any one.

III. It is finally suggested in argument by appellant that the contract of 1874 was executed on the part of the company by Oliver Garrison, president of the company, and it does not appear that he had any authority from the board of directors to enter into the same. It is a sufficient answer to this to say that the agreement was read in evidence without any objection by the defendant and no such question was raised in the trial court. Had the objection been made there, the proper proof might have been made. *Clark v. Conway*, 23 Mo. 442. Aside from this, however, this compact was made in settlement of a pending controversy to which the company was a party, involving its right to occupy this land. In recognition of the agreement the company paid \$1,025 and held and enjoyed the use of the property. From all which, and more, the trial court might

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well have inferred a ratification by the company of the act. The company cannot enjoy the fruit of a compact through a series of years and then be heard to repudiate its obligations.

The judgments of the lower courts were for the right party and the judgment of the court of appeals is accordingly affirmed. All concur.

BUSHONG V. TAYLOR *et al.*, Trustees, Appellants.

1. **Methodist Episcopal Church: TRUSTEES, POWER OF.** The trustees of a local church of the Methodist Episcopal Church in the United States, have authority, under its book of discipline, to mortgage or sell the church premises for the payment of money which the trustees have advanced or become responsible for to build the church.
2. ———: ———. Where the trustees refuse to exercise such power to sell, a court of equity will enforce the sale.
3. **Trustees of Church Signing Note as Individuals: LIABILITY.** Although the trustees did not add the designation of their office to their names on the note which they executed for the money advanced to build the church, yet as between them and the church, the note was the obligation of the latter, it appearing from the evidence that their signatures were made individually in order that the note might be disposed of to raise the money for the church.
4. **Methodist Episcopal Church: UNINCORPORATED LOCAL CHURCH: TRUSTEES.** The local church in this case being an unincorporated voluntary association, the trustees, from the nature of the government of the Methodist Episcopal Church, were the agents of the aggregate body of members, and of each member to the extent of his beneficial interest in the church property, in respect to debts contracted by the trustees for the benefit of the church premises.
5. **Practice: NECESSARY PARTIES.** The trustees are the only necessary parties defendant in a suit in equity, to enforce the debt against the church property.
6. **Principal and Surety: SUBROGATION.** A surety for the trustees on their note for the payment of money advanced to build the church, who pays the obligation of his principals, is entitled to be

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subrogated to the rights of the trustees to subject the church to the payment of the debt.

7. **Surety: STATUTE OF LIMITATIONS.** The statute of limitations begins to run against a surety, who pays the debt of his principal, from the time of such payment.
8. **Judgment, Satisfaction of.** A note, secured by a deed of trust on land, given and accepted in satisfaction of a judgment, is a payment of the latter.
9. **Surety, Payment of Debt by: INTEREST.** A surety who pays a judgment against himself for the debt of his principal, is entitled to recover from the latter the rate of interest paid on the judgment to the time of payment and six per cent thereafter.

Appeal from Pettis Circuit Court.—HON. WM. T. WOOD,
Judge.

AFFIRMED.

The note from which this suit originated was for the sum of \$1,250, payable to Cyrus Newkirk and signed in their individual capacities by the trustees of the Methodist Episcopal Church at Sedalia, and by plaintiff, then pastor of the church. Afterwards Newkirk recovered judgment on the note against plaintiff, and sold land of the latter under execution thereon, and bought it in for a small sum at the execution sale. Subsequently, in July, 1877, plaintiff obtained a re-conveyance from Newkirk of the land on terms agreed on between them and plaintiff executed to Newkirk his note secured by a deed of trust on the land. At the time of the institution of the present suit, part of this land had been sold and the proceeds paid to Newkirk and plaintiff had executed a new note for the residue, with deed of trust on the remainder of the land. This suit was one in equity to subject the church premises in Sedalia to sale for the payment by plaintiff of the amount of the judgment on the note which he had paid to Newkirk.

E. J. Smith, W. S. Shirk and F. A. Sampson for appellants.

The petition fails to state facts constituting a cause of

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action. It does not state the power of the trustees, nor that they had the power to do the acts charged as the foundation of this action, nor that Newkirk ever had any lien on the church property. It was error to allow plaintiff to testify to the custom of the Methodist Church in collecting subscriptions to pay debts and to make improvements. Plaintiff's case depends entirely on his own testimony, and that is contradictory and insufficient. Plaintiff's judgment was, in any event, excessive. The note only bore ten per cent interest till due, and after that six per cent. Its language is "with interest from date," not "till paid." Plaintiff's right of action was barred by the statute of limitations, the action not being on the note, but on an implied liability, and falls under the five years bar of Revised Statutes, section 3230. *Carr v. Thompson*, 67 Mo. 472; *Smith v. Ricords*, 52 Mo. 581; *Ricords v. Watkins*, 56 Mo. 553. Plaintiff had not paid the note in question so as to maintain this action. It was merged in a judgment against him, and that judgment is not satisfied. *Hearne v. Keith*, 63 Mo. 84. The court erred in permitting plaintiff to prove the action of the board of trustees by parol, when it was shown they kept a record and that record was in court. *Barcus v. Hannibal, etc., Road Co.*, 26 Mo. 102; *Johnson v. School District*, 67 Mo. 319; *First National Bank v. Hogan*, 47 Mo. 472. Even if the church received the benefit of the money, still it is not bound to pay it if the debt was originally not a legal one of the church. *Johnson v. School District, supra*. Plaintiff bases his claim solely on the action of the trustees, and they had no power to bind the church for it; the power belonged to the quarterly conference, according to church discipline. It is as much against public policy to sell a church on execution, as to sell a school house. The latter cannot be sold on execution. *State ex rel. v. Tiedman*, 69 Mo. 306. Plaintiff's proper remedy, if he has any, would be by mandamus to compel the proper officers of the church to take proper steps to make sale of the church as provided in the discipline. "The Methodist Epis-

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copal Church of Sedalia" is a corporation, and is not sued as such, and for this reason the motions for new trial and in arrest should have been sustained. Until the corporation is brought in no judgment can be given against it or its property sold. R. S. 1879, § 747.

George P. B. Jackson and *G. C. Heard* for respondent.

In equity cases where questions of fact have been passed on by the court in the first instance, and there is evidence upon both sides, the Supreme Court will not interfere, unless the decision on the question of fact is clearly erroneous. *Davis v. Fox*, 59 Mo. 125; *Cornet v. Bertelsman*, 61 Mo. 118; *Sharpe v. McPike*, 62 Mo. 300. Whether the trustees or the quarterly conference had the power to make the contract, makes no difference in this case, for both acted; each was fully advised of the action of the other, and ratified, time and again, all that was done concerning the transaction. The trustees were the proper officers to borrow money, make notes, etc. This results from the nature of the organization of the M. E. Church. The government of the M. E. Church is presbyterial, and not congregational, in its nature. The church is composed of the aggregate ministry and membership throughout the United States, and that aggregation is the real owner of all property, including all the churches in the United States. The title is held by trustees—different trustees for each piece of property, it is true—but the beneficial interest is in the whole body existing throughout the entire country, and not in the immediate congregation which may happen to worship in any particular building. The right to manage and dispose of the property rests in the aggregate body, acting through its proper agents, who for some purposes are the trustees. The book of discipline, which is the organic law of this denomination of Christians, clearly establishes the above views. The plan of separation adopted in 1844, when the M. E. Church divided North and South, was

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based upon this theory, and could have been accomplished in no other way, as was also the separation of the church in Canada from that in the United States, which occurred some years before. See *Gibson v. Armstrong*, 7 B. Mon. 481; *Smith v. Swormstedt*, 16 How. 288; 12 Am. Law Reg., pp. 201, 329, 537, and vol. 13, p. 65. And when certain seceders from this church, established in 1830 the Methodist Protestant Church, they adopted as a distinctive feature, a provision that churches were to be held in trust for the respective congregations. *Methodist Society of Georgetown v. Bennett*, 39 Conn. 294. Under the discipline, the quarterly conference is a local body, existing in and having powers only co-extensive with the congregation, and it is not in reason that such a limited body should be the one to bind the whole aggregate church. The discipline expressly authorizes this body by itself, and through its stewards, to raise money to pay the preacher, for charities and other such congregational matters, but nowhere authorizes them to do such acts as are the foundation of this suit. The silence of the discipline upon such power in the quarterly conference argues against the position of appellants. The laity in the M. E. Church act only in the quarterly conference, and the active authority over the church property is not in the laity, but in the clerical authorities, (*i. e.*, general and annual conferences,) and those acting for them. *Henderson v. Hunter*, 59 Pa. St. 335, 342. No case has been found in which the question whether the powers now being considered are lodged in the trustees, or in the quarterly conference, has been directly passed upon; but numerous cases exist where the trustees have exercised them, just as in this case, and they passed unchallenged, and were accepted as a basis for judgments of courts. *Trustees M. E. Church v. Schulze*, 61 Ind. 511; *Linn v. Carson*, 32 Gratt. 170; *Price v. M. E. Church*, 4 Ohio 515; *Trustees M. E. Church v. Garvey*, 53 Ill. 401; *Van Houten v. Dutch Church*, 17 N. J. Eq. 126, 132. The ministry and members of the whole M. E. Church in the United States were an unincor-

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porated voluntary association, extending throughout the United States, and the trustees were its agents. Acting in that capacity, the trustees could bind such members of the association, as it can be shown authorized or sanctioned the particular act, and no personal liability attached to the individual members beyond such authorized acts. *Ferris v. Thaw*, 72 Mo. 446; *De Voss v. Gray*, 22 Ohio St. 159; *Chick v. Trevett*, 20 Me. 462; *Keller v. Tracy*, 11 Ia. 530. When the title to property is held by trustees for a voluntary association of a large number of persons, it is sufficient to sue the trustees. *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Keller v. Tracy*, 11 Ia. 530; *Dillon v. Bates*, 39 Mo. 299; *Smith v. Swormstedt*, 16 How. 302; Story Eq. Plead., §§ 140, 141, 142, 143, 144, 150, 207 a and b. This cannot be accomplished at law, and the want of a remedy there renders the resort to equity necessary. *Linn v. Carson*, 32 Gratt. 179. Newkirk accepted the note and deed of trust from Bushong as full payment and satisfaction of the judgment obtained on the original note, and that authorizes plaintiff to maintain his action. *Cumming v. Hackley*, 8 Johns. 206; *Wetherby v. Mann*, 11 Johns. 518; 3 Mass. 403; *Randall v. Rich*, 11 Mass. 498; *Dormer v. Baxter*, 30 Vt. 467; *Elmwood v. Deifendorf*, 5 Barb. 398. Plaintiff's cause of action is not barred by the statute of limitations. He had no cause of action until he had paid the debt, or done what was equivalent, and the statute did not commence to run until his cause of action accrued. *Hearne v. Keith*, 63 Mo. 84; *Morrison v. Ins. Co.*, 18 Mo. 262; *Burton v. Rutherford*, 49 Mo. 255; *Singleton v. Townsend*, 45 Mo. 379. Newkirk was entitled to ten per cent interest until the debt was paid; the note bore ten per cent and so did the judgment. It was not pleaded as a defense, nor does the evidence show that the church is incorporated. It was essential that the articles of association should have been filed with the Secretary of State, and the corporate existence would only date from such filing. Gen. St. 1865, p. 327, § 2; *Ferris v. Thaw*, 5 Mo. App. 283; s. c., 72 Mo. 449; *Hurt*

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v. Salisbury, 55 Mo. 313. And even a proper incorporation of the church could not affect this case, for, as such corporation, it would only be a part of the general beneficiaries, and, as such, represented in this suit by the trustees. They could not have changed the title or interest in the property.

SHERWOOD, J.—This was a proceeding in equity and *in rem*. Its object was to subject certain church property of the Methodist Episcopal Church to the payment of a sum of money which became due to the plaintiff, because of a loan made by him to the trustees of that church, for which loan a note was executed by the trustees to plaintiff for \$1,250, and a like note to Newkirk, and the board of trustees, also, ordered that a mortgage on the church property be executed for the purpose of securing these notes, but the mortgage was never made. The plaintiff was successful in the trial court in subjecting the church property to the payment of his debt.

The evidence fully sustains the result reached by the trial court, and, although this is an equity case, even if the evidence were not as clear in some particulars as it is, we should not feel inclined to disturb the finding, as it is our custom somewhat to defer to the trial court, which always possesses those advantages which are derived from having the personal presence and observing the demeanor of the witnesses when testifying. This has been hitherto our uniform course, and we have refused to interfere with the conclusions reached by the trial courts on mere matters of fact, unless it readily appeared such conclusions were incorrect. The matters of fact arising on this record, being thus eliminated from our consideration, we address ourselves to those questions of law which arise upon the pleadings and the facts established by the evidence.

I. In respect to the allegations of the petition, we regard them as sufficient, and that the sufficiency of those allegations is fully sustained, and the nature of the relief

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sought, warranted by the case of *Linn v. Carson*, 32 Gratt. 170, which in essential incidents and circumstances, is substantially identical with the case at bar. In that case, Carson advanced money to the congregation to assist in building a church for the same denomination as that to which defendants belong, and governed by the same books of discipline, and the court of appeals of Virginia, in a well considered opinion, held that as the discipline of the church authorized sums of money, thus advanced at the instance of the trustees of the church, to be re-imbursed by a mortgage or sale of the church property, that a court of equity, at the suit of the party advancing such sums of money, would subject the church property to sale, for the purpose of satisfying the claim.

II. Contention is made by defendants, that the trustees were not the proper persons to contract, and that their contract possessed, as against the church property, no obligatory force; that this power belonged to the Quarterly Conference. This view we regard as unsound. Under the terms of the discipline it is provided that conveyances of real estate for the erection of houses of worship, shall be *in trust*, to be used, kept, maintained and disposed of, as a place of divine worship, etc., subject to the discipline, usage and ministerial appointments of said church. Sec. 378, par. 5, ch. 3. And paragraph 370 of the same chapter provides for a "board of trustees," for the church property, which board is to be elected, nothing in the local law forbidding, by the 4th quarterly conference of the circuit or station. Par. 372.

And by the terms of paragraph 374 of that chapter, if the trustees or any of them, or their successors, have advanced or are responsible for any sums of money on account of building a house of worship, or are obliged to pay such sums of money they are authorized either to mortgage or to sell the premises, after notice given to the pastor, etc. Paragraph 377 requires that the board of trustees of each circuit or station, shall hold all the church property. It is

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true paragraph 381 provides that when it becomes necessary that a sale of the church property for the payment of debts, or with a view to re-investment occurs, that then the trustees may obtain an order for the purpose from the quarterly conference, but this section evidently does not relate to circumstances provided for in paragraph 374, where the trustees have advanced or become responsible for a sum of money for building a church as in the case at bar. In such circumstances, the power of the trustees is full, ample and complete, either to sell or mortgage the church property. And where a power of sale exists in a trustee or trustees, a court of equity may enforce a sale for the payment of the debt, and this is of common occurrence in cases of ordinary trust deeds, and *a fortiori*, where the trustee proves recalcitrant, and fails to exercise the power given him. No case appears to have been found where the point of the power of trustees to charge the church property has been directly passed upon, but several instances have occurred where such powers have passed unchallenged and formed the basis of judgments of courts of last resort. *Trustees M. E. Church v. Shulze*, 61 Ind. 511; *Linn v. Carson*, *supra*; *Price v. M. E. Church*, 4 Ohio 515; *Trustees M. E. Church v. Garvey*, 53 Ill. 401; *Van Houten v. Dutch Church*, 17 N. J. Eq. 126.

This appears to have been the construction given to the discipline by this particular society, as evinced by numerous acts of its trustees. But granting, for argument's sake, that the trustees had no such powers as those above detailed; granting that the acts of the trustees in order to charge the church property, must have received the sanction of the quarterly conference, has not this sanction been obtained? We think it has, in a variety of ways. The whole matter of the trustees giving the notes was laid before the quarterly conference the next year, 1868, and then the action of the trustees was as fully confirmed as was possible for it to be. Since that time and for a number of years, the board of trustees, as well as the quarterly con-

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ference, has recognized the notes given as a church debt, by listing them as such in the reports made by the trustees to the conference, and by paying the note executed by Newkirk in full; and it was not until 1874 that the quarterly conference struck the note of plaintiff out of the church debts. So that, so far as concerns the disposition of the present cause, it makes no matter in which body was lodged the power essential to charge the church property.

III. The trustees did not add the designation of their office to the signatures to the promissory notes. This is explained by evidence showing that the notes were to be placed in bank in order to raise money, which required the signatures to be made individually. Nevertheless, as between the signers and the church, the notes were the obligations of the church. The church in question was an unincorporated, voluntary association and the trustees, both according to the discipline and the acts of ratification already mentioned, were the agents of that association, and, therefore, could bind such members of the association, as sanctioned the acts of the trustees, the liability of the association depending for its validity upon the act done, rather than on the form in which the act finds expression. *Ferris v. Thaw*, 72 Mo. 446, and cas. cit.; *De Voss v. Gray*, 22 Ohio St. 159; *Chick v. Trevett*, 20 Me. 462; *Keller v. Tracy*, 11 Iowa 530. And looking to the character of the organization and the nature of the government of the M. E. Church, it would seem clear that the trustees are the agents of the aggregate body of members, at least, so far as is necessary to upholding the relief sought for in this case, and that any member who unites with the association, under and subject to the discipline, thereby of necessity, gives to such trustees authority to act for him within the meaning of the book of discipline, to the extent of his beneficial interest in the property owned by the association, and that, in consequence of this, any debt contracted by such trustees on account of the premises, will be the debt of the members, so far as concerns their beneficial interest, and to the extent

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of such interest held by the trustees, and it cannot be tolerated that such an association could so convey its property as to place it beyond the reach of a court of equity enforcing the claims of its creditors. This has been so ruled even where the association was incorporated. *Magie v. Church*, 2 Beas. (N. J.) 77.

IV. Now as to the method of procedure for enforcing the obligation created by the trustees of the church. We are of opinion that the trustees were the only necessary parties defendant. They were selected by the association to hold and manage the property for the sake of convenience, and there is no necessity to look beyond them. Besides, the *cestuis que trustent* are so numerous and so constantly changing by death, removal, etc., beyond the jurisdiction, that it would be intolerably oppressive and practically impossible to bring in all the beneficiaries. In such circumstances it is allowable to proceed against the trustees alone. *Van Vetchen v. Terry*, 2 Johns. Ch. 197; Story Eq. Pl., §§ 148, 150, 207a. As stated at the outset, this is a proceeding *in rem*, its only object being to charge the beneficial interest of the members of the church, which was vested in the trustees in accordance with the terms of the discipline.

The trustees were empowered by those terms to mortgage or sell the church property in discharge of debts for which they had become responsible. They have failed to perform their duty in this regard to the plaintiff, and the arm of the court of equity is not too short to reach them and compel a performance of that duty. Indeed, it may be taken for granted that plaintiffs incurred the debt for the benefit of the society and with their approval, relying upon the assurances contained in the book of discipline, and on the promise made by the trustees that a mortgage should be executed to secure the debt. *Linn v. Carson*, *supra*, sustains this position. And it is immaterial that in that case the plaintiff was one of the trustees of the church; for the plaintiff here was a surety for the trustees, and they being entitled under the terms of the discipline to a mort-

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gage on, or sale of, the property, concerning which the debt was incurred, he will on the plainest and most familiar principles be entitled to be subrogated to all their rights and remedies. 1 Story Eq. Jur., §§ 499, 499e, 502; *Furnold v. Bank*, 44 Mo. 336. The trustees being entitled to mortgage or to sell the property, and refusing to do their duty, equity will afford relief by decreeing that to be done which affords the adequate remedy.

V. Relative to the statute of limitations pleaded in defendants' answer, plaintiff's cause of action never arose till 1877, when he paid the debt of his principals, the trustees, by satisfying the judgment which Newkirk had against him and this suit was brought in 1879. *Hearne v. Keith*, 63 Mo. 84. And the deed of trust and note given by plaintiff and accepted by Newkirk, in satisfaction of the judgment, was tantamount in law to a payment thereof. *Witherby v. Mann*, 11 Johns. 518.

VI. No objection is discovered to the amount of the judgment. The note to Newkirk and the judgment recovered upon it bore ten per cent interest; and the settlement between plaintiff and Newkirk was in 1877, up to which time the court allowed ten per cent interest and after that date the usual rate.

For these reasons we affirm the judgment. All concur.

BUSHONG V. TAYLOR *et. al.*, Trustees, Appellants.

Execution. A second execution should not be quashed merely because it is not entitled an "*alias* execution."

Appeal from Pettis Circuit Court.—HON. WM. T. WOOD,
Judge.

AFFIRMED.

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E. J. Smith, W. S. Shirk and F. A. Sampson for appellants.

G. P. B. Jackson and G. C. Heard for respondent.

SHERWOOD, J.—This case is an offshoot of the case of *Bushong v. Taylor*, ante, p. 660, the only point in it being whether the trial court ruled correctly in refusing to quash a second execution, merely because it was not entitled an "alias execution."

The ruling was proper. The first execution was a void writ, because it recited a judgment which had no existence, *i. e.*, one rendered against the trustees *personally*, whereas in fact the judgment was only for the sale of the property.

Therefore, judgment affirmed. All concur.

WILKERSON, *Administrator*, v. FARNHAM *et al.*, *Appellants*.

1. **Pleading: COUNTER-CLAIM.** In an action upon a promissory note, damages arising out of a different transaction and constituting a cause of action *ex delicto*, cannot be set up as a counter-claim.
2. **Landlord and Tenant: IMPROVEMENTS: COUNTER-CLAIM.** In the absence of an express promise to pay, no recovery can be had by a tenant for improvements made by him. Where there is an express promise it is a proper subject of counter-claim *ex contractu*.
3. **Pleading: EVIDENCE.** It is a general rule that in ordinary money demands the fact of payment is in the nature of new matter, and by our code inadmissible under a simple denial.
4. ———: ———. Under a general denial the defending party is always at liberty to disprove and overthrow the contract asserted against him, by proving that it was materially different from the one so asserted.

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Appeal from Pettis Circuit Court.—HON. J. P. STROTHER,
Judge.

AFFIRMED.

E. J. Smith and W. S. Shirk for appellants.

(1) The court erred in admitting and excluding testimony. It was competent to prove by Tucker the value of the stable, and that the same and the damage for being kept out of possession of the lot sold to defendants, was not included in or settled in the note. A note is only *prima facie* a settlement of prior dealings, and the contrary may be shown in action between the original parties to it. The reply was a general denial, and it was error to receive the testimony of Goodwin as to a contract different from that relied on by defendants. Defendants had no notice of any such defense to their claim. There was no evidence to support the court's addition to defendants' first instruction, nor plaintiff's four instructions. (2) When a party agrees to sell and convey, and then refuses, the purchaser may recover for lost profits on his bargain, such as enhanced value of the land, etc. *Kirkpatrick v. Downing*, 58 Mo. 32, and cases cited; *Newark Coal Co. v. Upton*, 22 Am. Law Reg. 483. (3) The defense relied on here, viewed either as set-off or recoupment, is competent, for it arises on contract and grows out of the same matter for which the note sued on was given. *Gordon v. Bruner*, 49 Mo. 570.

John Montgomery, Jr., and B. G. Wilkerson for respondent.

(1) The circuit court did not err in its several rulings to the effect that all that part of the answer relating to the tearing down and removing the stable from the lot described in said deed, did not state sufficient facts to constitute any defense. The facts so stated in said answer are not

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a defense as a set-off, because they set up a claim for unliquidated damages, neither are they good as a counter-claim. They do not constitute a "cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. And they do not constitute a cause of action arising on contract." (2) The second instruction asked by defendants was properly refused. The answer made no claim for rental value. (3) The fourth instruction asked by plaintiff, was properly given. And there was no error in the admission of the testimony of the witness, Goodwin.

MARTIN, C.—This is an action on a promissory note in the sum of \$325, dated July 15, 1877, wherein the defendants, under the firm name of Farnham & Gilman, promised to pay to the order of G. R. Smith the amount aforesaid, for rent of a stable and yard for the past year. It bore interest at the rate of ten per cent per annum and was indorsed with certain credits amounting to about \$30. As the points involved in this case arise out of the answer which is somewhat unusual in its form and import I will set out the material parts of it in the language of the pleader.

"And for further answer defendants say that on the 25th day of April, 1876, defendants bought of said G. R. Smith the undivided three-fourths of the following described real estate. (Here follows the description). That by the terms of said sale to and purchase by defendants they were to have had and should have had possession of said premises on said April 25, 1876, but same was in possession of one Tucker, a tenant of said Smith, who refused to surrender the same, and kept and held it till the first of September of that same year. That when said Smith saw that he could not give defendants said possession, as he was bound to do, he then offered defendants as a compensation for said possession during that time, that they should have

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and retain said stable so reserved in said deed, which defendants agreed to accept, and which defendants say was worth, as it then stood on said ground, \$350; but defendants say when said Tucker did give said premises up on September 1st, said Smith forthwith took and removed said stable and carried it away so that defendants were deprived of the same.

And defendants say that they were, at the time of said purchase, engaged in the business of keeping a livery stable, and had given up another stable they had lately occupied, and bought said property of said Smith to use for said purpose and business, and to continue said business, having then on hand a large stock of horses, carriages, etc., and having then a well established business, all of which was all the time well known to said Smith. Then when said parties found out that said Smith could not deliver possession of said premises to defendants, April 25, 1876, in order to enable said defendants to do some business, said Smith built a small stable and some sheds divided off into stalls, and enclosed a wagon yard on certain lots just adjoining that above described and owned by said Smith and rented and agreed to rent the same to defendants for the term of five years, at \$25 per month. That defendants did not get possession of said small stable and sheds till July 4th, on account of said default of said Smith, during which time they had to hire their own horses kept and store their carriages, buggies and vehicles. That the note here sued on was given under these circumstances for the rent of said small stables, sheds and wagon yard.

That when defendants got possession of the ground so bought by them from said Smith, which was September 15th, 1876, they forthwith set about to erect thereon a suitable stable and barn wherein to conduct and carry on their said business and erected and completed the same without any unavoidable delay, and only got the same completed so they could occupy it on December 1st, 1876, during all of which time they labored under great inconven-

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ience in having to do business in a building, stable and sheds unfit and too small for the same. That after defendants so got into their own stable said Smith represented to them that he had a chance to sell said small stable, sheds and yard with the grounds on which they were, and asked defendants to surrender the same and release him from his contract whereby he had contracted they should hold the same for five years, and defendants having, while in possession of the said small stable, sheds and wagon yards, made considerable improvements on the same in the way of front and back platforms to the said stable, and in grading up and putting in good condition the stalls in the sheds, and in putting up a large gate with high posts leading into said yard, all to the cost and value of \$250. Said defendants offered if said Smith would pay them for said improvements they would surrender the said premises to said Smith and release him from his said contract to rent the same longer to defendants, all of which terms said Smith accepted, and he promised so to pay defendants for said improvements, and on those terms defendants gave up possession of said premises to said Smith and so released him from his contract of further renting the same to defendants. By reason of which said Smith became indebted to defendants in said sum of \$250."

The answer concludes with a prayer that the value of the improvements and damages be ascertained and applied towards payment of the note sued on and judgment be given for any balance over the amount necessary to satisfy the note. To this answer the plaintiff filed a general denial. The trial resulted in a verdict and judgment for plaintiff in the sum of \$285.50, from which the defendants have appealed.

I. The answer, as a pleading under our code or any other known system of procedure, is extremely defective and should have been reformed before trial. Conceding that the defendants were entitled to a trial of such issues as can be fairly evoked from the facts and circumstances stated,

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it becomes our task, by no means an easy one, to indicate such issues and determine whether they have been properly tried. There are two distinct transactions complained of in the form of counter-claims. One relates to the carrying away of a stable from the premises purchased by defendants, while the other relates to improvements made on another piece of ground which the defendants held from the plaintiff's intestate as tenants. So much of the pleading as recites the conveyance of land, reservation of a building thereon and detention of possession after conveyance, is immaterial and superfluous, for the reason that the defendants do not assume to ground their counter-claim on the facts so recited. Undoubtedly the defendants could recover for detention of the possession by action on the covenants in the deed. But no such action is stated by them. On the contrary they aver that the damages for such detention were settled by a sale to them of the reserved building. It is unnecessary for us to inquire whether this sale could be proved up by reason of the statute of frauds, unless it should be clear that the defendants could make the carrying away of the building so purchased by them the subject of a counter-claim to this suit. Certainly after averring an unrevoked composition and settlement of the damages for detention they could not be allowed to recover for them notwithstanding they may be included in the prayer for judgment. Thus it is apparent that the only action stated in this part of the answer is an action for taking away the building alleged to have been sold to defendants. This is an action in tort. It has nothing to do with the note sued on, which was given for the rental of another piece of ground. It could not, therefore, constitute a proper counter-claim in an action on the note and the court did not err in excluding all evidence tending to support it. *Emery v. Railroad*, 77 Mo. 339; *Barnes v. McMullins*, 18 Mo. 260; *Dimmock v. Daly*, 11 Mo. App. 354; *Edgerton v. Page*, 20 N. Y. 281; *Mayor etc. v. Parker*, 8 Bosw. 300.

II. In regard to the improvements on the small stable,

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sheds and yard, it is apparent that the defendants seek to recover the value thereof upon an express promise of the plaintiff's intestate to pay for them in consideration of a surrender of the leasehold upon which they were made. Outside of some express promise, no recovery could be had for them, the rule being that every tenant repairs and improves upon his own responsibility. This promise was the proper subject of a counter-claim *ex contractu*. The plaintiff, in his reply, contents himself with a simple denial of such contract. It thus becomes incumbent on the defendants to prove it substantially as alleged. It may be conceded that they submitted evidence tending to establish it as alleged. In denial of it the plaintiff submitted evidence tending to prove that his intestate agreed to pay for the value of the improvements in rents of the leasehold, accruing subsequent to the date of the note sued on, and that the defendants occupied the premises thereafter, by his permission, a sufficient length of time to satisfy the demand for said improvements. The defendants objected to this testimony on the ground that the reply, consisting of a simple denial, could not justify evidence of payment, which was in the nature of new matter. The objection was overruled and the evidence admitted. There may be cases in which the fact of non-payment is a fact to be proved in order to sustain the plaintiff's *prima facie* cause of action. But as a general thing, in ordinary money demands, the fact of payment is in the nature of new matter, and inadmissible by our code under a simple denial. The logic of principle and the weight of authority lead to this result. Bliss Code Plead., § 358; *Ennis v. Hogan*, 47 Mo. 513; *Hubler v. Pullen*, 9 Ind. 273; *Stevens v. Thompson*, 5 Kas. 305; *McKyring v. Bull*, 16 N. Y. 297.

But the evidence submitted by plaintiff did not consist of the mere fact of payment, and that portion of it may be disregarded as immaterial to the issue in the case. It was in its nature a denial of the contract sued on. The answer sets out an absolute and unqualified promise to pay

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for the improvements. This meant a payment forthwith and in money. Under plea of denial the plaintiff had the right to prove that he agreed that the improvements should be paid in or deducted from the rents accruing subsequent to the note. If such was the contract, then the defendants could not recover on the one alleged by them. Neither could they recover on the one so proved without answering that the plaintiff's intestate had failed or refused to pay according to the contract, or had hindered the defendants in some way from receiving their pay, in the manner provided for in the contract. If he had denied subsequent occupation to defendants or collected the rents to his own use, the action on the contract would be complete by averring such facts. Under a general denial the defending party is always at liberty to disprove and overthrow the contract asserted against him by proving that it was materially different from the one so asserted. My conclusion is that the evidence was clearly admissible under the reply of general denial and that the court did not err in admitting it and in instructing upon it. There being no error, the judgment is affirmed. All concur.

THE STATE V. ROUND, *Appellant*.

Criminal Law: PROSTITUTION. One who takes a girl under eighteen years of age away from her uncle's house in Iowa, where she is temporarily visiting, under an arrangement made with her before she left her home, and brings her into the county in Missouri where she resides with her father for the purpose of prostitution, and there accomplishes his design, is guilty under Revised Statutes, section 1257, of taking her away from her father for the purpose of prostitution, and is properly indicted in the county where the latter resides.

Appeal from Mercer Circuit Court.—HON. G. D. BURGESS,
Judge.

AFFIRMED.

Ballew & Ormsby for appellant.

D. H. McIntyre, Attorney General, for the State.

It is contended that the taking was in Iowa and not in Mercer county, Missouri; and that the evidence, therefore, is not sufficient to convict, the court having no jurisdiction of the offense. Under the English statute against taking women forcibly, and against their will, for purposes of marriage or defilement when taken in one county and carried into another, if the force was continued in the last county, the abductor could be indicted therein. 1 Wharton Crim. Law, (8 Ed.) § 588; 1 East P. C., 453. The gist of the offense under that statute, as under section 1257, Revised Statutes, was the taking away, and the abductor, under our statute, may be indicted in any county into which he takes the girl. In larceny, where the taking is in one county and the thief takes the stolen property into another, he may be indicted in the latter county. This was the doctrine at the common law. Upon the same principle this defendant was liable to indictment in Mercer county, Missouri, when he carried the girl into that county after taking her in Iowa. For by nature and by law the father had the right to her legal charge and possession at all times and places, (*People v. Cook*, 61 Cal. 478,) and having the girl in possession in Mercer county without the father's consent, was taking her out of his possession in said county.

HENRY, J.—Defendant was indicted for taking one Sarah A. Fuqua, a female under eighteen years of age, from the charge of her father for the purpose of prostitution.

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His plea was not guilty. On a trial the jury found him guilty and assessed his punishment at imprisonment in the penitentiary for a term of three years. From the judgment of the court on the verdict he has appealed.

The evidence was to the effect that the girl was under eighteen years of age; had gone with her father's consent to visit an uncle in Iowa, about thirty miles distant from her home in Mercer county. That after she had been there about two weeks the defendant, in pursuance of an arrangement with her before she went to Iowa, went with a two-horse wagon to her uncle's house and represented that her brother was sick at home and her father had sent him for her. They started next morning and passed that night alone in the woods in Mercer county, and he had sexual intercourse with her in Mercer county. We forbear to relate other disgusting details which are disclosed by the evidence. The contention of appellant's counsel in the court below, he files no brief here, was, that having taken her, not from her father's in Mercer county, Missouri, but from her uncle in the state of Iowa, where she was on a visit, the offense defined in section 1257 was not committed. That section is as follows: "Every person who shall take away any female, under the age of eighteen years, from her father, mother, guardian or other person having the legal charge of her person, either for the purpose of prostitution or concubinage * * * shall, upon conviction," etc.

The father had the care and custody of the daughter even while she was in Iowa at her uncle's, the same as if she had been on a visit to a neighbor in the same county. The legal care and custody of the daughter was not committed to David Bedell, her uncle, by the father's injunction to him to keep her out of bad company. That obligation would rest upon any gentlemen with respect to any young woman visiting at his house, even if no such request had been made by her parents. She was temporarily visiting her uncle in Iowa, was taken thence to the county in Mis-

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souri in which she resided with her father, and there the crime was consummated. If she had been visiting a neighbor in an adjoining county, near her father's residence, and taken from there for the purpose of prostitution, and its accomplishment occurred in the county where she lived with her father, no doubt could be entertained that it would be proper to allege that the crime was committed in the latter county.

The crime defined by the statute is not the forcible seizure of the daughter and taking her by force from her father's possession; such a crime is seldom, if ever, committed. But the statute was intended to punish an offense of such frequent occurrence as to demand legislation on the subject. It does not require, in order to establish this crime, that the female should be taken from the house or premises of the person having legal charge of her person, from the actual possession of such guardian, but only that she be taken away from such person for the purpose named in the statute. Whether, after she was taken away from her uncle's residence in Iowa, if defendant accomplished his purpose in that state, and not elsewhere, he could have been indicted and punished in this State, is a different question. Here the arrangement was made with her in this State, in Mercer county, that she should accompany him to Mercer county from her uncle's, and in contemplation of law, while she first started with him in Iowa, yet he took her from her father in Mercer county, and then accomplished his designs upon her.

The judgment is affirmed. All concur.

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THE STATE *ex rel.* WRIGHT, *Collector*, v. THE ST. LOUIS, IRON
MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Appellant*.

Taxes: ASSESSMENT OF RAILROAD PROPERTY. Under the act of 1871 (Laws, p. 56; 2 Wag. Stat., p. 1214 b, art. 2,) county assessors were not authorized to assess the lands of railroad companies situated within their counties, but all railroad property was required to be valued and apportioned, as provided by said act, by a special board consisting of the State Treasurer, State Auditor and Register of Lands, and the county courts of the several counties in which such property was situated levied taxes for county purposes upon the apportionment certified to the county clerks of such counties by such special board, as required by law.

Appeal from Scott Circuit Court.—HON. J. D. FOSTER,
Judge.

REVERSED.

D. L. Hawkins with *Bennett Pike* for appellant.

(1) The petition does not state facts sufficient to constitute a cause of action. 2 Wag. Stat., p. 1214 c; *Well-shear v. Kelley*, 69 Mo. 343. (2) The assessor of Scott county had no authority or power, at the time of the alleged assessment of said lands, to-wit: for the years 1872, 1873, 1874, 1875 and 1876, to assess the same, and the assessment is, therefore, wholly void. *Allen v. Armstrong*, 16 Ia. 508; *Abbott v. Lindenbower*, 42 Mo. 162. (3) The evidence conclusively shows that the land was not assessed to the owner, or to any one who ever had been the owner, and the assessment is, therefore, utterly void. Cases cited, *supra*.

Arnold & Hunter for respondent.

RAY, J.—This suit was instituted by the collector to recover taxes alleged to be due and unpaid upon lands in Scott county, described in the petition, for the years 1872, 1873, 1874, 1875 and 1876, under the delinquent tax law of

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1877. The petition states substantially that under and by virtue of the laws of Missouri the officers and agents of Scott county and the State, having legal authority to do so, laid and assessed taxes upon the real estate described, stating the amount of taxes assessed against each tract, the different funds for which taxes were levied, and that the taxes amounted in the aggregate to \$1,611.29, for which judgment was asked. Defendant's answer is a general denial.

Before the trial of the cause, plaintiff, by leave of the court, amended the petition by alleging "that immediately after the taking effect of the back tax law of 1877, the collector of the county of Scott returned to the clerk of the county court of said county as delinquent the lands described in the petition, and thereupon, within sixty days thereafter said clerk made out the same into a 'back tax book' and delivered it to said collector, and that all of said lands remained unredeemed on the 1st day of January, 1879." On the trial plaintiff obtained judgment, from which defendant has appealed. Appellant's counsel are in error with respect to the allegations in the petition, occasioned by their having overlooked the amendment to the petition made at the April term, 1882, above noticed.

The testimony introduced by the plaintiff shows that the lands were assessed by the county assessor for the years 1872 to 1876, inclusive, to one Blakely Wilson. Wilson is not shown to have ever had any title or claim, while the evidence for the defense, consisting of a patent from the United States to defendant, shows that the title to the lands remained in the United States until the 23rd of January, 1877, the date of the patent. Prior to that time, the defendant was the equitable owner of the lands, and, if the lands were subject to taxation before 1877, a question we will not consider, they should have been assessed in the name of defendant. This court held in *Abbott v. Lindenhower*, 42 Mo. 167, that "An assessment in the name of a

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person who neither was, nor ever had been, the owner of the property, would be an utterly void assessment."

But another objection to the assessments for the years 1872 to 1877, inclusive, is, that it seems to have been done by the county assessor, while by the act of 1871, under which alone he appears to have acted, it was provided that all railroads then constructed, or in process of construction, or which should thereafter be constructed in this State, and all property owned by any railroad company or corporation, should be subject to taxation for State, county and other municipal or local purposes to the extent and in the manner therein provided. 2 Wag. Stat., p. 1214 b, § 1. By subsequent sections, with the details of which it is unnecessary to encumber this opinion, the State Treasurer, State Auditor and the Register of Lands were constituted a board of equalization of railroad property, and required to meet on the first Monday in May of each year and proceed to adjust and equalize the aggregate valuation of each railroad company and apportion the aggregate valuation to the several counties as therein prescribed. This result was to be certified to the county courts of the several counties concerned, whose duty it then was to make the levy for county purposes on such value, etc.

There was no evidence that the State board ever performed its duty with respect to the property of this company. On the contrary, the clerk of the county court testified that "there were no certificates in his said office on file or otherwise showing any assessment or equalization, or otherwise fixing the value of the lands in controversy by the State Board of Equalization nor from the Auditor prior to the year 1877, nor any action by the State Board of Equalization." Upon what theory the judgment was rendered in favor of plaintiff, we cannot conjecture. Respondent has filed no abstract or brief, and the record does not disclose the ground upon which the defendant was held liable.

The judgment is reversed and the cause will be re-

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manded in order that plaintiff, if he has a case against the defendant, may have another opportunity to make it out. All concur.

KITCHEN V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

Railroads: KILLING STOCK: AMENDMENT OF STATEMENT. In an action against a railroad company, brought before a justice of the peace, under Revised Statutes 1879, section 809, for double damages for killing stock, the statement may be amended upon appeal to the circuit court so as to show that the killing occurred in an adjoining township to the one in which suit was brought.

Appeal from Moberly Court of Common Pleas.—HON. G. H. BURCKHARTT, Judge.

AFFIRMED.

Smith & Krauthoff with *T. J. Portis* for appellant.

(1) The court below erred in permitting plaintiff to amend his complaint. The fact that the injury sued for happened in Sugar Creek township, or an adjoining township, was required to appear from the justice's proceedings, and in its absence there was no jurisdiction. *Hansberger v. Railroad Co.*, 43 Mo. 196; *Haggard v. Railroad Co.*, 63 Mo. 302; R. S., § 2839. The point that the justice had no jurisdiction can be made for the first time in the circuit court. *Webb v. Tweedie*, 30 Mo. 488; *Dillard v. Railroad Co.*, 58 Mo. 69. No process could legally be issued upon such a statement. *Gist v. Loring*, 60 Mo. 487; *Madkins v. Trice*, 65 Mo. 656. Where the petition does not state facts authorizing the service made, the defect cannot be cured by amendment. *Huff v. Shepard*, 58 Mo. 242. (2) The court erred in refusing the defendant's demurrer to the evi-

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dence on the part of the plaintiff, which did not show that the animals were killed at a place where it was the defendant's duty to fence. For aught that appears, the killing may have taken place within an incorporated city or town, or within depot grounds or switch limits, required by public necessity to be kept open, or at a private road crossing.

Mumpower v. Railroad Co., 59 Mo. 245; *Cary v. Railroad Co.*, 60 Mo. 209; *Holman v. Railroad Co.*, 62 Mo. 562; *Wyatt v. Railway Co.*, 62 Mo. 408; *Crews v. Lackland*, 67 Mo. 619.

(3) The court erred in denying defendant's application for continuance. When an amendment of this character is made, the defendant is entitled, as a matter of right, to have time to plead. *Neidenberger v. Campbell*, 11 Mo. 359.

Hollis & Wiley for respondent.

MARTIN, C.—The plaintiff sues under section 809 of the Revised Statutes of 1879, for double damages on account of the killing of a mare. The case, on appeal from the justice, was tried by the court without aid from a jury, and judgment was rendered in favor of the plaintiff in the sum of \$70, which was, on motion of plaintiff, doubled. From this judgment the defendant appeals.

The principal objection urged against the judgment is, that the court allowed the plaintiff to amend his petition in the upper court, after appeal to that tribunal. The original petition alleged that the mare was killed in Union township. The suit was commenced before a justice of the peace in Sugar Creek township, but failed to state that Union township, in which the accident occurred, was an adjoining township. The petition was unobjectionable in other respects, and the court permitted the plaintiff to amend it by adding the necessary allegation to that effect. In *Mitchell v. Railroad Co.*, ante, p. 106, the right of the appellate court to permit an amendment of this character, was considered and approved.

The action of the court in refusing a continuance, was

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not such as to indicate any abuse of its discretion in matters of this kind. The objection that the evidence fails to negative the possibility of the mare being killed inside of the corporate limits of a town or city, is not sufficient to justify a reversal. The bill of exceptions purports to set out only the tendency of the evidence. I think the statement of the tendency of the evidence, meagre as it is, would warrant a jury in finding that the place of killing was not within the corporate limits of a town or city. I think they had the right to infer that from the testimony of the plaintiff, in absence of any testimony from the defendant, as to the place of killing.

The judgment should be affirmed, and it is so ordered.
All concur.

ALLEN, *Appellant*, v. MANSFIELD.

1. **Evidence, Objection to:** PRACTICE IN SUPREME COURT. A party objecting to evidence must state his grounds therefor, and the bill of exceptions must show what was the specific objection urged against the admissibility of the given testimony before the trial court. Otherwise it cannot be known in the Supreme Court upon what the circuit court was asked to pass, and the former will not review its action.
2. **Instructions, Amendment of:** EXCEPTIONS. Where the court amends instructions asked by a party, and gives them as amended, it is equivalent to a refusal of them, and gives the party the full benefit of his exceptions to the action of the court.
3. **Limitations:** ADVERSE POSSESSION: TITLE: EJECTMENT. Ten years consecutive adverse possession, under claim of title, gives the title to the occupant as effectually as any written conveyance. And the ten years' possession need not be the ten years next before the date of the action of ejectment.
4. **Statute of Limitations:** WAIVER OF BENEFITS OF: TITLE. An agreement made after title has been perfected by operation of the statute of limitations to waive the benefits of the statute, is not effective, but the title remains in the party, who has thus acquired

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it, until he conveys it back with all the solemnities required in any deed to land.

5. **It was Proper**, under the circumstances of this case, to instruct the jury that if defendant did in fact surrender her title and consent to hold as tenant to plaintiff, they must find that she knew what she was doing.
6. **Parol License to Occupy Land: TENANT AT WILL: NOTICE: EVICTION.** A parol license to one by the owner of land that the licensee may occupy the land during the latter's natural life, is revocable at the will of the owner. Such licensee is a tenant at will, and entitled to notice to quit before he can be evicted.
7. **—: IMPROVEMENTS: EVICTION.** Where one is induced by the owner of land to occupy the same for a permanent home, and while upon it makes improvements not severable from the freehold, such improvements so made give the holder such right and interest in the use of the property, that neither the owner nor his heirs and assigns can put him off without compensating him for such improvements.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

AFFIRMED.

Allen H. Vories and E. O. Hill for appellant.

(1) The court erred in permitting defendant to testify that Mansfield, who was dead, gave her the lot, because Mansfield, one of the contracting parties, being dead, the other party could not testify, and because the declarations of Mansfield were not proper testimony to prove title in himself or defendant, or in disparagement of his title. 1 Greenleaf's Ev., §§ 109, 110. (2) The court erred in refusing to give plaintiff's instructions as asked. He had the right, under the law, to have them given or refused as asked, and the modification was equivalent to a refusal. There was no evidence to warrant such modification. Instructions must be based on the evidence. *Doebling v. Loos*, 45 Mo. 150; *Ewing v. Goss*, 41 Mo. 492. The instruction as to the statute of limitation was clearly erroneous. The plea in the answer was ten years prior to the commencement of the suit, while the instruction was ten years

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prior to 1877. The suit did not commence until 1881, leaving four years in which defendant might not have claimed the property. (3) Plaintiff's third instruction should have been given.*

J. F. Pitt for respondent.

PHILIPS, C.—This is an action of ejectment to recover possession of the east part of lot 7, in block 44, in South St. Joseph. Ouster laid January 2nd, 1881. The answer tendered the general issue, and special plea of statute of limitation, and title by gift, and adverse possession.

The evidence on plaintiff's part tended to show that the lot in 1865 belonged to one Allen G. Mansfield. The lot was partitioned among his heirs and fell to Wm. A. Mansfield. The plaintiff bought the lot under a judgment against said William, and received a sheriff's deed therefor. The defendant was then in possession, and plaintiff called to see her. He testified that defendant told him that her old master, Allen G. Mansfield, told her she should live there as long as she lived; that she dug the well and built the house there, and paid for them by washing; that he told her he did not want anything of hers; that he might not want the lot for ten years, and if she had anything of worth he would pay her for it. This was in 1877. Two years after this plaintiff went on to the west part of the lot and put up a small house and built a fence there; that about this time she commenced quarrelling with him about the matter.

Her testimony was to the effect that in 1865, when she was about starting to move to some town with her children, her old master, Mr. Allen G. Mansfield, told her he would give her this lot if she would move on to it and live there; that he did not wish to see her dragging her children around. Mansfield built the cabin on the lot. She moved in in 1865, built a fence around the yard, dug a well and built some out-houses, and handed her old mistress

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money to pay the taxes. She had lived on the place continuously ever since, claiming title to it, etc. There was some corroborative testimony of her statements. Plaintiff claimed that no taxes had been paid save those paid by himself after the partition sale. The trial was had before a jury.

The plaintiff then asked the court to instruct the jury as follows :

1. That under the admissions made on the trial and the deed read in evidence, the plaintiff is entitled to recover in this suit

2. If the jury believe from the evidence that the defendant surrendered to the plaintiff the west end of said lot 7, and that he took possession of the same by her consent, and agreed to deliver up the possession of the east end thereof whenever required by plaintiff, then the defendant cannot set up any title in herself, and the jury will find for this plaintiff.

3 That if the jury believe from the evidence that Allen Mansfield told the defendant that she might occupy the premises in controversy during her lifetime, and that she only claimed the premises under the license of Mansfield prior to and up to the time that plaintiff purchased said lot, then such possession could not be adverse to Mansfield's heirs or their grantees, and her living upon said lot could not give her title to it.

All of which instructions the court refused, to which plaintiff at the time excepted.

The court then, against the consent of plaintiff, modified the first and second instructions as follows :

By adding to plaintiff's first instruction these words :
" Unless the jury find from the evidence in this case, that more than ten years prior to 1877, Allen G. Mansfield placed defendant in possession of the lot in controversy to be by her held and owned by her as her property, and that for more than ten years prior to 1877, defendant occupied said lot openly, notoriously and adversely," as her own.

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And by adding to plaintiff's second instruction the words, "Provided at the time of such alleged surrender, if any was made, defendant knew she was surrendering her title to plaintiff, and with such knowledge consented to hold said lot as the tenant of plaintiff."

To which modifications or additions the plaintiff at the time excepted.

The defendant then asked the court to instruct the jury as follows:

If the jury believe from the evidence that about the year 1865 Allen G. Mansfield had the possession of the premises described in plaintiff's petition surveyed, built a house thereon, and verbally gave the same to plaintiff, and put her in possession thereof, and that plaintiff has ever since said date been so in possession, claiming to own the same, and that such possession has been open, notorious and actual, under claim of ownership, then the jury will find for the defendant.

The jury returned a verdict for defendant. The plaintiff prosecutes this appeal from the judgment of the court based on said verdict.

I. It is assigned for error that the court permitted the defendant to testify to conversations between her and Allen G. Mansfield respecting the gift of this property to her. It is now claimed that he was dead at the time of this trial, and, therefore, she is disqualified to testify to such contract. If it were conceded that such fact worked a disqualification of the witness, the plaintiff has not sufficiently preserved the objection in the bill of exceptions. It appears only that he objected to a part of this testimony. No reason was assigned to the court for the objection. This is not enough. The party must state to the court the grounds of his objection, and the bill of exceptions must show what was the specific objection urged before the trial court against the admission of the given testimony. Otherwise it cannot be known that the question presented in the Supreme Court, as the basis of the objection, is the same upon which the

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circuit court was asked to pass. *Roussin v. St. Louis Perp. Ins. Co.*, 15 Mo. 244; *Clark v. Conway*, 23 Mo. 442; *Knipper v. Bechtner*, 32 Mo. 255; *Rosenheim v. Am. Ins. Co.*, 33 Mo. 230; *Gillett v. Mathews*, 45 Mo. 307.

II. Error is alleged in the giving and refusing of instructions. Counsel complain that the court, instead of refusing the instructions, as asked by him, gave them as amended by the court. This was tantamount to a refusal and gave the plaintiff the full benefit of his exception to the action of the court. *Meyer v. P. R. R. Co.*, 40 Mo. 151.

III. The first instruction asked by plaintiff was properly refused. If the defendant's testimony was credited by the jury, the title to the lot was in the defendant, and the plaintiff was not entitled to recover. The amendment made by the court is assailed on the ground that it fixed the ten years' limitation prior to 1877, instead of 1881, the date of institution of suit, "leaving four years in which the defendant might not have claimed the possession." This criticism is evidently based on the assumption that the ten years' adverse possession to constitute title, must be the ten years next before the date of the action of ejectment. This is a misconception of the nature of the title acquired by adverse possession. The ten years' consecutive adverse possession, under claim of title, gives the title to the occupant as effectually as any written conveyance. It takes away the title of the real owner and transfers it to the occupant. "The party who acquires a title to land under the statute by possession adverse to the true owner, acquires all the title of the true owner precisely as if he had a deed from him." The statute of limitations gives a perfect title. *Hughes v. Graves*, 39 Verm. 359; *School Dist. v. Benson*, 31 Me. 384, 385; 3 Washburn Real. Prop., 164, side p. 501; *Nelson v. Brodhack*, 44 Mo. 600. So it must result that, if in 1877 the defendant had held the adverse possession of this land for the requisite ten years, she had then acquired the complete legal title to it. The intervening four years

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between that time and the institution of this action, could not, therefore, affect her title. There is no dispute but that defendant's possession began in 1865. If it ripened into a title at all, it had done so in 1877, when plaintiff bought, for it had then been continuous for over ten years. Any act done, or conversation had by her, to impair that title or authorize plaintiff to enter upon her possession, would necessarily have to be of the like character which would impair the title and take away the right of possession, had she held a perfect deed from Allen Mansfield.

"An agreement made after the lapse of the statutory period to waive the benefit of the statute, is not effective, but the title remains in the party who has acquired it under the statute until he conveys it back with all the solemnities required in any deed of land." 3 Washburn Real. Prop., 164. In this view of the law, the second instruction was properly refused. It broadly asserts that if defendant surrendered possession of the west end of the lot (no matter when) and agreed to deliver up the possession of the east end (the part in controversy) when required, the jury should find for plaintiff. It is not obvious in the first place, that there was any evidence whatever from which a reasonable jury could have drawn the inference of any agreement on the part of defendant to surrender any part of this land. There certainly was no written agreement and no consideration to support one. The plaintiff seems to have gotten on to the west half of the lot without asking leave; and the condition of the defendant, a former slave, was not likely to make her very assertive against a comer like the plaintiff. The amendment made by the court to the instruction was demanded by the circumstances of the case. It required the jury to find, in case of any surrender in fact that the defendant knew she was surrendering her title and consented to hold as tenant to plaintiff. In other words, that she knew what she was doing. It is to be borne in mind that all these transactions and interviews

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between the parties were long after defendant's title, if ever, was completed by operation of the statute of limitations. Therefore, unless she surrendered her possessory right by contract, establishing the relation of landlord and tenant between her and plaintiff, there was nothing to prevent her from asserting her title and right of possession.

IV. The third instruction asked by the plaintiff abstractly announced a correct principle of law. But an instruction may not be a mere abstraction nor wholly irrelevant to the evidence, yet it may be so phrased or present such a partial view of the issues, as to justify its rejection. We think this instruction was calculated to mislead the jury, because it apparently limited the inquiry as to whether the defendant had the title in fee to this lot. It does not necessarily follow that plaintiff is entitled to recover in this action, even if defendant entered under a parol license to occupy during her natural life. Of course, a mere parol license could confer no interest in the land. It, without more, would be countermandable and revocable at the will of the owner. *Cook v. Stearns*, 11 Mass. 533; *Fuhr v. Dean*, 26 Mo. 116; *Desloge v. Pearce*, 38 Mo. 588. Washburn on Eas., 5, 19. Even on plaintiff's theory, the utmost he could claim is, that the defendant, as such licensee, was a tenant at will, and, as such, she was entitled to notice to quit before she could be evicted. There is no proof of any such notice in this record. Again, if defendant's evidence was credited, she was induced by Mr. Mansfield to turn aside from her purpose and preparation to locate elsewhere, and go upon this land for a permanent home. She accepted, entered upon the land and made improvements, among which was the digging of a well which is not severable from the freehold. These facts, aside from any question touching the statute of limitations, gave her such right and interest in the use of the property that neither the licensor nor his heirs and assigns could put her off, without compensating her for her improvements. *Fuhr v. Dean*, *supra*, 121.

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The instruction asked by plaintiff left out of view these propositions. At all events, we think the merits of the whole case were fairly presented to the jury in the instructions given, and the ends of justice do not demand a further hearing.

The judgment of the circuit court is, therefore, affirmed. All concur.

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ABBREVIATIONS.

SEE DEEDS 3, 4.

ADMINISTRATION

1. EXECUTORS AND GUARDIANS: ANNUAL SETTLEMENTS: EVIDENCE. Annual settlements of guardians and executors do not constitute *prima facie* evidence in their behalf. *The State to the use of Koch v. Roeper*, 57.
2. GUARDIAN: BOND, ACTION ON BEFORE FINAL SETTLEMENT. A ward who has attained his majority, may sue on his guardian's bond before the latter has made final settlement in the probate court. *Ib.*
3. TRUSTEES' INVESTMENTS: MAL-ADMINISTRATION. Where a trustee makes an investment in his private capacity, and fails to indicate promptly that his investment is on account of the estate he has in charge, he, thereby, subjects himself to well grounded suspicion of mal-administration upon claiming it to have been on account of the estate, after loss or depreciation of the security taken by him. *Ib.*
4. ADMINISTRATION: SALE OF LAND: VOID ORDER. An order of probate court for the sale of land of a decedent, for the payment of his debts without a petition therefor, and without notice of the intention to apply for the same as required by law, is void, and a sale thereunder will pass no title, except where, on a settlement of the accounts of the administrator, it appears the personal estate is insufficient to pay the debts of the estate, in which case the court can make the order of sale of its own motion. *Teverbaugh v. Hawkins*, 180.
5. WILL: POWER TO SEVERAL AS EXECUTORS, EXECUTION OF. Where a power in a will to sell land is given to several as executors, and not as persons, all need not act. The survivor or survivors may, in such case, lawfully execute the power. *Gaines v. Fender*, 497.
6. PROBATE COURT: EXECUTOR: BOND: SURETIES. Where a probate court having proper jurisdiction finds there are sufficient funds of the estate in the hands of the executor for the purpose and orders

the payment of an allowance, and such order is not appealed from, nor vacated for fraud or other reason, it is binding on the executor and his sureties in an action on the bond. *The State ex rel. Richardson v. James*, 509.

7. EXECUTOR: BOND, BREACH OF. The failure to pay such allowance after the making of the order, is a breach of the obligation of the bond "to perform all other things touching said executorship required by law or the order or decree of any court having jurisdiction." *Ib.*
8. SURETIES: BOND. In an action for such breach of the bond, the sureties as a defense *pro tanto*, cannot claim that they are liable only to the extent of the funds of the estate in the hands of the executor at the date of the execution of the bond. *Ib.*
9. PROBATE COURT: MOTION: NOTICE. The action of the probate court in sustaining a motion to set aside an order for the payment of an allowance because the order did not state the specific amount to be paid, and its entry of a new order in lieu of the former, is really one transaction, and an executor who filed the motion is chargeable with notice of the entry of the last order. *Ib.*
10. EXECUTOR: REVOCATION OF LETTERS: BOND. An executor, who resigns or is displaced, and is permitted by the court to make final settlement and take the receipt of his successor and go out of court, is not liable to an action on his bond by a creditor for the latter's allowance against the estate, and such is the case although the court may have ordered the executor, while in office and when he had funds of the estate in his hands, to pay all demands against the estate and he failed to do so. *The State ex rel. Crane v. Heinrichs*, 542.
11. ———: ———. The funds of the estate in the hands of the executor at the time of his displacement, are debts due the estate, and can, under the statute, be paid by him only to his successor in office. *Ib.*

ADVERSE POSSESSION.

LIMITATIONS: ADVERSE POSSESSION: TITLE: EJECTMENT. Ten years consecutive adverse possession, under claim of title, gives the title to the occupant as effectually as any written conveyance. And the ten years' possession need not be the ten years next before the date of the action of ejectment. *Allen v. Mansfield*, 688.

SEE POSSESSION, 1.

AMENDMENT.

SEE INSTRUCTIONS,

RAILROADS, 8, 11.

APPEALS.

1. **APPEAL: JUSTICE: RAILROAD.** A railroad which runs through a county and has been sued therein by service of process on its local agent, is a resident of such county within the meaning of Revised Statutes, section 3041, relating to appeals from justices of the peace, and must prosecute such appeals within the time limited to other residents of the county. *Crutsinger v. The Missouri Pacific Railway Company*, 64.
2. **APPEALS FROM ST. LOUIS COURT OF APPEALS: CONSTITUTIONAL QUESTIONS: JURISDICTION.** In cases in which appeals lie from the St. Louis court of appeals, only because constitutional questions are involved, the Supreme Court has jurisdiction to consider those questions only. *Humes v. The Missouri Pacific Railway Company*, 221.
3. **PRACTICE: APPEARANCE: JURISDICTION.** The appearance of a defendant in the circuit court, on appeal from a justice of the peace, for the sole purpose of filing a plea in abatement, is not such an appearance to the action as to forbid his raising the question of jurisdiction. And where it appears he was served with summons in the township where he resided, which does not adjoin that in which suit was brought, the action should be dismissed on his motion. R. S., § 2839. *Fare v. Gunter*, 522.

SEE JURISDICTION, 3.

APPURTENANCE.

SEE LAND AND LAND TTLES, 1, 2.

ASSESSMENT OF REVENUE.

SEE TAXES.

BAILMENTS.

1. **PLEDGE.** A pledgee without a special agreement to that effect, cannot retain the property pledged for any other debt than that for which the pledge was specifically made. *The Southworth Co. v. Lamb*, 242.
2. ———: **PAWNOR'S INTEREST, SALE OF: TROVER.** The pawnor of a chattel, notwithstanding his pledge, has still a vendible interest in it, and the vendee of such interest can maintain trover against the pawnee, if the latter refuses to deliver it to him on his tendering the amount of the debt. *Id.*

BAILMENT, CONTRACT OF. *Weir Plow Co. v. Porter*, 23.



BILL OF EXCEPTIONS.

BILL OF EXCEPTIONS. An entry of the record proper showing the filing, or leave of court to file, a bill of exceptions, is necessary to make it a part of the record. *Dinwiddie v. Jacobs*, 195.

SEE PRACTICE IN SUPREME COURT, 3.

BURDEN OF PROOF.

SEE POSSESSION, 1.

CARRIERS.

COMMON CARRIERS: NEGLIGENCE. A common carrier is not permitted to stipulate against its own negligence. Especially is this true in its carriage of passengers. *Tibby v. The Missouri Pacific Railway Company*, 292.

CHAMPERTY.

SEE CONTRACTS, 9.

PLEADING, 8.

CITY OF LIBERTY.

SEE MUNICIPAL CORPORATIONS.

CONDEMNATION OF PROPERTY.

1. **CONDEMNATION OF PRIVATE PROPERTY FOR PUBLIC USE: DEDICATION** When private property is condemned or dedicated for one public use, it cannot be appropriated to another and different use, or be appropriated to private use. *The Belcher Sugar Refining Co. v. The St. Louis Grain Elevator Co.*, 121.
2. ———: **TITLE: DIFFERENT USE.** The fee simple title is not acquired by proceedings condemning private property for public use, and if such property is to be used for a purpose other than that for which it was condemned, the original owner must first be compensated for such additional different use. *Ib.*
3. ———: ———: ———. Where the city of St. Louis condemned private property for use as a wharf, it cannot lease it unconditionally for a term of years to be used in the prosecution of private business and for private gain. *Ib.*
4. ———: **CONSTRUCTION.** Laws authorizing the taking of private property for public use, should be strictly construed and closely scrutinized. *Ib.*

5. CONDEMNATION PROCEEDINGS: TITLE: RAILROADS. In proceedings to condemn land for a right of way for a railroad, until the assessed damages are paid to the owner by the railroad company, the title remains in the owner. *Green v. The Missouri Pacific Railway Company*, 653.
6. ———: ———: ———. In condemnation proceedings, where the exceptions of the land-owner to the report of the commissioners are sustained and a new hearing granted, the payment into court by the railroad company of the damages assessed, will not divest the owner of the title. Upon the allowance of his exceptions, the owner's right to the money so paid is gone, and the parties are referred to the result of a second assessment and report by commissioners and the judgment of the court thereon. *Id.*
7. LANDLORD AND TENANT: LEASE: NOTICE TO QUIT: ESTOPPEL: EJECTMENT. Where a railroad company in proceedings to condemn land for a right of way pays the damages assessed to the circuit clerk for the owner, but upon allowance by the court of the latter's exceptions, voluntarily withdraws the money and enters into an agreement with the owner whereby it leased the land from the latter for a term of years, with stipulation to quit upon notice given, the relation of landlord and tenant is thereby created, and the railroad company is estopped to deny the landlord's title and right of possession. And if the stipulated notice to quit is given, the owner has a right of action to recover possession, either under the landlord and tenant act, or by ejectment. *Id.*

CONSIDERATION.

SEE CONTRACTS, 12.

CONSTITUTIONAL LAW.

1. CONSTITUTION: RAILROADS: DOUBLE DAMAGE ACT. Section 43 of the railroad law, (Wag. Stat., p. 310,) making railroad corporations liable in double damages for stock killed by their engines and cars in consequence of failure to erect and maintain fences as therein required, is not repugnant to section 20 of article 2 of the constitution of Missouri of 1875, which declares "that no private property can be taken for private use with or without compensation, unless by the consent of the owner." Nor is it repugnant to section 53 of article 4 of that constitution which provides that "the general assembly shall not pass any local or special law * * * granting to any corporation, association or individual any special or exclusive right, privilege or immunity." *Humes v. The Missouri Pacific Railway Company*, 221.
2. ———: ———. The constitutionality of the double damage act both as regards the State and Federal constitutions, re-affirmed. *Id.*
3. DOUBLE DAMAGE ACT: CONSTITUTIONALITY OF. The decision in the case of *Hume v. The Missouri Pacific Ry Co.*, ante, p. 221, affirming the constitutionality of the double damage act, in respect to both State and Federal constitutions, adhered to. *Meyers v. The Union Trust Company*, 237.

4. **CONSTITUTION: TAKING PRIVATE PROPERTY FOR PUBLIC USE: RIPARIAN RIGHTS, DAMAGE TO: COMPENSATION.** Damage to the rights of a riparian owner of land on the Mississippi River in the city of St. Louis, caused by the projection of a dike by the city into the river, was within the protection of article 1, section 16 of the constitution of 1865, which provided "that no private property ought to be taken or applied to public use without just compensation." *Myers v. The City of St. Louis*, 367.
5. ———: **SPECIAL LAW.** The act of the general assembly, approved March 28th, 1881, authorizing cities acting under special charters, and containing more than 30,000 and less than 50,000 inhabitants, to establish a system of sewerage and to construct, establish and keep in repair sewers, culverts and drains, is not a special law, and as such, prohibited by the constitution. *Rutherford v. Heddens*, 388.
6. ———: **RELIGIOUS CORPORATION.** Under section 8, article 2 of the present constitution, there can be no incorporation in this State of a church for a religious or other purpose, except such as may be created under a general law for the sole purpose of holding title to such real estate as may be prescribed by law for a church edifice, parsonage and cemetery. *The Catholic Church v. Tobbein*, 418.
7. **CONSTITUTIONAL LAW.** The provision of Revised Statutes, section 835, giving the injured party a right of action against a railroad for three times the excess of the legal rate of freight charged by it is constitutional. *Burkholder v. The Union Trust Company*, 572.

CONTINUANCE.

SEE PRACTICE, CRIMINAL, 1.

CONTRACTS.

1. **VENDOR: VENDEE: CONTRACT: WARRANTY.** Where a vendee buys a number of cattle, and by the terms of the contract of sale they are to be weighed upon the vendor's scales, and paid for according to the weight as determined by said scales, there is an implied warranty on the part of the vendor that such shall be lawful scales, and capable of indicating lawful weights, and the vendor is liable to the vendee for all money paid him by the latter by reason of excessive weights, as indicated by the defective scales, although there was no pretense of actual fraud on the part of the vendor. *Clifton v. Sparks*, 115.
2. **CONTRACT IN RESTRAINT OF TRADE, VIOLATION OF: INJUNCTION.** A contract not to engage in a particular kind of business, at a specified place for a limited time, is not invalid as being in restraint of trade, and injunction lies to restrain its violation. *Gill v. Ferris*, 156.
3. **SALE OF GOODS: STATUTE OF FRAUDS: MEMORANDUM.** A memorandum of the sale of goods to be sufficient under the statute of frauds, must state the contract with reasonable certainty so that its substance will appear from the writing itself, without recourse to parol evidence. *Smith v. Shell*, 215.

4. CONTRACT: SALE: DELIVERY: MEMORANDUM. It is not essential to the validity of such a contract that it should stipulate for any time or place of delivery of the goods, but if there be such a stipulation, the memorandum must contain it. *Ib.*
5. SALE: MEMORANDUM, CONSTRUCTION OF. Where in the sale of goods the time and place of delivery are not agreed upon, the memorandum will be construed as a contract for delivery within a reasonable time and at the vendor's customary place. *Ib.*
6. CONTRACT: VARIANCE. A plaintiff cannot recover upon a contract for the sale of goods which he testifies is not the contract made between him and the defendant, and which is one materially different from that alleged in his petition and evidenced by the memorandum in writing. *Ib.*
7. STATUTE OF FRAUDS: PROMISE TO DEBTOR TO PAY HIS DEBT. A promise made to a debtor of a third person to pay the debt for him, if founded on a new and valid consideration, is not within the statute of frauds, and the creditor can sue the promisor directly on the agreement; but it is otherwise if the promise is made to the creditor himself. *Green v. Estes*, 337.
8. CONTRACT: CONSIDERATION, PROOF OF DIFFERENT ONE. Where an executory contract recites a consideration which is shown to be nominal or unreal, the real consideration can be shown for the purpose of supporting the contract. *Moore v. Ringo*, 468.
9. ———: CHAMPERTY. A contract to defray half the expenses of litigation necessary to set aside a deed as fraudulent, and to share in the proceeds of such litigation, is champertous; but a contract is not champertous which provides that one party is to buy the land and convey one-half interest therein to the other, and the latter is then to bring suit for it and pay half the costs of the litigation. *Ib.*
10. LAND, CONTRACT FOR SALE OF. A contract in writing for the sale of land, need not all be contained in one instrument signed by the vendor. *The Young Men's Christian Association of Kansas City v. Dubach*, 475.
1. CONTRACT: BAWDY HOUSE: EVIDENCE. A contract to sell a house to one whose purpose is to keep a bawdy house, is not unlawful, and a suit to enforce it cannot be defeated by proof that it was really a contract of lease, and, therefore, invalid. *Sprague v. Rooney*, 493.
12. DOUBTFUL CLAIM, COMPROMISE OF: CONSIDERATION. The compromise of a doubtful claim asserted in good faith, affords a valuable consideration to support a promise. *Rinehart v. Bills*, 534.
13. CONTRACT FOR PERSONAL EMPLOYMENT, CONSTRUCTION OF: DISMISSAL. Defendants employed plaintiff to buy hogs for them, the terms of the contract being contained in a letter to him written by a member of defendants' firm, and which stated "We accept your offer of a twelve months' engagement at \$100 a month, subject to your giving us satisfaction. I may say that the hogs you have bought for us have given satisfaction;" *Held*, that defendants could not terminate

the contract before the end of the year, except for inefficiency or unfaithfulness of plaintiff in the discharge of the duties of his employment. *Beggs v. Fowler*, 599.

14. CONTRACT: ESTOPPEL. A party cannot enjoy the fruits of a contract through a series of years, and then be heard to repudiate its obligations. *Green v. Missouri Pacific Railway Company*, 653.

CONTRACT, CONSTRUCTION OF: BAILMENT. *The Weir Plow Company v. Porter*, 23.

SEE MUNICIPAL CORPORATIONS, 9.

SPECIFIC PERFORMANCE.

CORONER.

CORONER'S FEES: MANDAMUS. The allowance of fees to a coroner for an inquest on a dead body, is, under Revised Statutes, section 5157, subject to the judicial discretion of the county court, and cannot be controlled by a writ of mandamus. *The State ex rel. Patterson v. Marshall*, 484.

CORPORATIONS.

1. CORPORATION: STOCKHOLDER: MOTION FOR EXECUTION: PRACTICE. A motion under the statute, (Wag. Stat., p. 291, § 13,) by a judgment creditor of a corporation, for execution against a stockholder for an unpaid subscription to its stock, is a substitute for a bill in equity to reach assets in the hands of the stockholder; the refusal of the court to grant the motion is a finding of the issue for the defendant, and the remedy for error of the lower court in that regard is by a motion for a new trial and exception to the action of the court in overruling the latter motion. *Erskine v. Loewenstein*, 301.
2. ——— : ——— : ——— : ———. It is not necessary that the bill of exceptions should show that the creditor excepted to the action of the court in overruling the motion for execution against the stockholder. *Ib.*
3. EXECUTION AGAINST STOCKHOLDER: TRIAL: STATUTE. The statute relating to such execution against a stockholder, contemplates a hearing and determination of the motion by the court, without the intervention of a jury. *Ib.*
4. STOCK: UNPAID SUBSCRIPTION: PURCHASER. One is not liable to such action by the creditors of a corporation for an unpaid subscription to its stock, who purchased from a former holder for value and without knowing or without inculpatory negligence in not knowing that it was so unpaid for. *Ib.*
5. STOCKHOLDER: ESTOPPEL. One who voluntarily places himself on the books of a corporation as the owner of its stock, will be estopped to deny his title thereto as against its creditors. *Ib.*

6. CORPORATION: EXISTENCE DE JURE, HOW DETERMINED. Whether or not a corporation exists *de jure*, cannot be determined in a collateral proceeding, if it appear to be acting under color of law and recognized by the State as such. The question of its being must be raised by the State itself on a *quo warranto* or other direct proceeding; and this is the case, although the act incorporating it or authorizing its incorporation is violative of the constitution of the State. *The Catholic Church v. Tobbein*, 418.
7. CONSTITUTION: RELIGIOUS CORPORATION. Under section 8, article 2 of the present constitution, there can be no incorporation in this State of a church for a religious or other purpose, except such as may be created under a general law for the sole purpose of holding title to such real estate as may be prescribed by law for a church edifice, parsonage and cemetery. *Ib.*
8. CHURCH ORGANIZATION: INCORPORATION. A church organization for religious purposes, continues after the incorporation of the religious body for the purpose for which such incorporation is authorized by the constitution. *Ib.*
9. CHURCH: WILL: INCORPORATION. A testator willed certain real and personal estate to the Catholic Church at the city of Lexington. Subsequently and after the taking effect of the will, the plaintiff was incorporated under the same name as that of the church organization, which name it seems to have adopted with reference to the provisions of the will. *Held*, the plaintiff, by its incorporation, did not acquire any of the property rights of the Catholic Church organization at the city of Lexington. Whether or not the church at Lexington, as distinguished from the corporation of that name, can receive and hold the property bequeathed and devised to it, can be determined only in a suit instituted by that church. *Ib.*
10. PRACTICE: LEGAL CAPACITY TO SUE: CORPORATION. The question of the legal capacity of plaintiff to sue as a corporation, must be raised by demurrer or answer, or it is waived. *The Young Men's Christian Association of Kansas City v. Dubach*, 475.
11. ——— : ——— : ——— : POWER TO HOLD LAND: DEFENSE. The incapacity of a corporation, in a suit by it for the specific performance of a contract to sell land, to purchase and hold the same is a matter of defense. *Ib.*

COSTS.

COSTS: CHARGES AGAINST ATTORNEY: PRIVATE PROSECUTOR. Where charges, under Revised Statutes 1879, sections 488, 489, against an attorney to disbar him are set on foot and prosecuted by private persons, the costs may be properly adjudged against them on their failure to sustain the charges. *The State ex rel. Mansur v. Kemp*, 213.

COUNSEL.

SEE PRACTICE, CRIMINAL, 1, 4.

COUNTER-CLAIM.

1. COUNTER-CLAIM : STATUTE. Under Revised Statutes, section 3522, in an action arising on contract, any other cause of action arising on contract and existing at the commencement of the action, may be pleaded by way of counter-claim. *Ashby v. Shaw*, 76.
2. PLEADING: COUNTER-CLAIM. In an action upon a promissory note, damages arising out of a different transaction and constituting a cause of action *ex delicto*, cannot be set up as a counter-claim. *Wilkinson v. Farnham*, 672.
3. LANDLORD AND TENANT: IMPROVEMENTS: COUNTER-CLAIM. In the absence of an express promise to pay, no recovery can be had by a tenant for improvements made by him. Where there is an express promise it is a proper subject of counter-claim *ex contractu*. *Ib.*

COURTS.

SEE ST. LOUIS CRIMINAL COURT.

CRIMINAL COSTS.

CRIMINAL COSTS, NON-LIABILITY OF COUNTY FOR. Prior to the act of 1883, (Sess. Acts, p. 80,) the expense of boarding and lodging juries, kept together by order of the court in cases of felony, was not a proper item of costs, and could not be taxed against the county as such, by the court. *Person v. Ozark County*, 491.

CRIMINAL LAW.

1. CRIMINAL LAW: DISTURBING PEACE OF NEIGHBORHOOD. In a prosecution under Revised Statutes 1879, section 1527, for disturbing the peace of a neighborhood, to sustain a conviction, it must be shown that the peace of those residing in the vicinity of each other, and regarded as neighbors, was disturbed. It is not enough to show that the peace of those assembled at a park or other public place was disturbed. *The State v. Hughes*, 86.
 2. DRUNKENNESS, EVIDENCE AS TO INADMISSIBLE. The trial court committed no error in refusing to permit a witness to state whether defendant was drunk or sober at the time of the killing, as drunkenness neither excuses nor extenuates crime. *The State v. Ramsey*, 133.
- PER SHERWOOD, J.
3. CRIMINAL LAW: INSTRUCTION. An instruction on the law of self-defense, condemned as confused and misleading. HENRY, J., concurring. *The State v. Culler*, 623.
 4. ——— : SELF-DEFENSE, WHEN NOT ABROGATED. While one may not bring on a combat in order to wreak his vengeance on his enemy and shield himself behind the pretext of self-defense, yet where the

quarrel is sudden, no felonious intent entertained, and no deadly weapon used by him at the outset, the right to defend his life against an assault with a deadly weapon still exists in his favor, and is not abrogated by reason of the fact that he began the sudden quarrel. HENRY, J., concurring. *Ib.*

- 8 ———: PROSTITUTION. One who takes a girl under eighteen years of age away from her uncle's house in Iowa, where she is temporarily visiting, under an arrangement made with her before she left her home, and brings her into the county in Missouri where she resides with her father for the purpose of prostitution, and there accomplishes his design, is guilty under Revised Statutes, section 1257, of taking her away from her father for the purpose of prostitution, and is properly indicted in the county where the latter resides. *The State v. Round*, 679.

SEE PLEADING, CRIMINAL.

PRACTICE, CRIMINAL.

DAMAGES.

1. DAMAGES, WHO MAY SUE FOR. The only persons who are authorized to sue for the damages allowed by Revised Statutes 1879, sections 2121, 2122, 2123, (Wag. Stat., pp. 519, 520, §§ 2, 3, 4,) are the husband or wife or minor children, or the father and mother, or either of them where the other is dead, in case the deceased be an unmarried minor. Where all these beneficiaries perish in the same disaster, there is no person left to whom the action survives. *Gibbs v. The City of Hannibal*, 143.
2. DAMAGES: PROPERTY. Revised Statutes 1879, sections 2121, 2122, 2123, have no reference to injuries or damages to the property of the deceased. *Ib.*
3. SEDUCTION: DAMAGES. No recovery can be had for the wounded feelings of plaintiff's family in an action for seduction of his daughter, based on the loss of her service. *Comer v. Taylor*, 341.
4. ———: ———: MISCONDUCT OF THE WOMAN. Where the carnal intercourse is occasioned as much by the misconduct of the woman as that of the man, there can be no exemplary damages. *Ib.*
5. DAMAGES: SEDUCTION: MEDICAL ATTENDANCE. In such action the parent will be entitled to recover for medicine and medical attendance, if reasonable, whether he has paid the sum due therefor or not. *Ib.*
6. INJUNCTION: BOND: DAMAGES. An assessment of damages for defendant upon the dissolution of an injunction, cannot be made except as incident to a bond or stipulation given by plaintiff to pay the damages consequent upon such dissolution. *The City of St. Louis v. The St. Louis Gaslight Company*, 349.

7. **CONSTITUTION: TAKING PRIVATE PROPERTY FOR PUBLIC USE: RIPARIAN RIGHTS, DAMAGE TO: COMPENSATION.** Damage to the rights of a riparian owner of land on the Mississippi River in the city of St. Louis, caused by the projection of a dike by the city into the river, was within the protection of article 1, section 16 of the constitution of 1865, which provided "that no private property ought to be taken or applied to public use without just compensation." *Myers v. The City of St. Louis*, 367.

DEDICATION.

1. **DEDICATION: INTENTION.** Dedication of land to public use depends upon the intention of the owner, and whenever this intention is unequivocally manifested, the dedication is made, so far as the owner of the soil is concerned; and if accepted and used by the public in the manner intended, the dedication is complete, and the owner and all claiming in his right are precluded from asserting any ownership inconsistent with such use. *Pierce v. Chamberlain*, 618.
2. ——— : ———. The intention of the owners to dedicate in this case held to be clearly expressed. *Ib.*

SEE CONDEMNATION OF PROPERTY, 1.

DEEDS.

1. **DEED: HUSBAND AND WIFE: SURVIVOR.** By a deed executed to husband and wife they become seized in entirety of the land conveyed, and the survivor takes the whole estate. *Modrell v. Riddle*, 31.
2. **TAX DEED: DESCRIPTION OF LAND.** The description of the land in a tax deed must conform to that contained in the anterior proceedings. *Lowe v. Ekey*, 286.
3. ——— : ABBREVIATIONS: STATUTE. Under Wagner's Statutes, page 1212, section 240, authorizing certain abbreviations in describing land in tax deeds and proceedings relating to the same, abbreviations can be used only as provided in said section, and when used they will be insufficient under said section, unless the land intended to be designated by their use is so designated thereby that it may be identified or located. *Ib.*
4. ——— : ———. Abbreviations used in description of land in the tax deed and anterior proceedings in this case, held insufficient. *Ib.*
5. **DEED, AMBIGUITY IN: NATURAL MONUMENTS, CALLS AND DISTANCES.** Natural monuments and objects called for in a deed shall control in case of ambiguity, although they conflict with the courses and distances called for by the deed. And when the latter, in its description of the land conveyed, calls for a river as a boundary, this call will prevail. But if doubt as to the intention of the parties should still remain, resort may then be had to evidence of the surroundings of the parties at the time of the execution of the instrument. *Myers v. The City of St. Louis*, 367.

6. DEED: CHAIN OF TITLE: PURCHASER. A deed lying outside of a purchaser's chain of title, imparts no notice to him. *Tydings v. Pitcher*, 379.
7. CHAIN OF TITLE: NOTICE: PURCHASER. A purchaser is bound with constructive notice of all recorded instruments and recitals therein, lying within his chain of title. *Ib.*
8. ———: VENDOR'S LIEN: NOTICE. A recital in a deed in a purchaser's chain of title that a part of the purchase money therefor is unpaid, is notice to him of a vendor's lien, and puts him on inquiry as to every fact that the existence of the lien would imply or lead to. *Ib.*
9. ———: ———. Such purchaser is put upon inquiry as to the fact that the lien may have been extinguished by an unrecorded deed reconveying the premises to the former owner. *Ib.*
10. EXECUTION: LEVY: SHERIFF'S DEED. Where, under an execution issued on a joint judgment against two defendants, the sheriff levies on land as the property of one of them, and sells and conveys the interest of the latter, his deed will not pass to the purchaser any interest the other defendant may have in the land. *Frederick v. The Missouri River, Ft. Scott & Gulf Railroad Company*, 402.
11. DEED OF TRUST, ACKNOWLEDGMENT OF. A deed of trust acknowledged before the trustee therein, where its execution is duly proved, is good between the parties thereto and those claiming under them. *Bennett v. Shipley*, 448.
12. SHERIFF'S DEED: RECITAL OF PARTIES TO EXECUTION. Where a sheriff's deed recites the parties to the judgment, and that the execution issued thereon, without again naming the parties, and it is clearly inferable that the execution was issued on the judgment named in the deed, the latter is not open to the objection that it fails to recite the names of the parties to the execution as required by the statute. R. S., § 2392. *Gaines v. Fender*, 497.
13. DEED, DESCRIPTION IN. Each part of the descriptive language in a deed is to be construed with relation to the other parts, and no inflexible rule of interpretation will be allowed to defeat its clear meaning. *Brown v. Gibson*, 529.

SEE LAND AND LAND TITLES, 4.

TRUSTS AND TRUSTEES, 6, 7, 8, 9.

DISBARMENT.

SEE COSTS, 1.

DISTURBING PEACE.

SEE CRIMINAL LAW, 1.

DOWER.

1. **JOINTURE: DOWER: STATUTE.** A post-nuptial contract for jointure in lieu of dower, provided for by Revised Statutes, section 2202, has no binding force on the wife until, by some act of hers after discovery, she acquiesces in or accepts the provision made for her benefit in such contract. She may, under said section 2202 renounce the jointure and have dower, but cannot claim both. *Roberts v. Walker*, 200.
2. ———: ———. A husband and wife can agree to annul his marital rights as to personal property which came to him in her right before the married woman's act of 1875, (Acts, p. 61,) and to re-transfer it to her as a suitable provision in lieu of dower in his estate. *Id.*

SEE LAND AND LAND TITLES, 5.

DRUNKENNESS.

SEE CRIMINAL LAW, 2.

EJECTMENT.

1. **EJECTMENT: STATUTE OF LIMITATIONS.** The statute of limitations not only bars plaintiffs' recovery in an action of ejectment, but it also confers title on the occupant, which he may show under a general denial. *Fulkerson v. Mitchell*, 13.
2. **HOMESTEAD: CONVEYANCE BY WIDOW: MINOR CHILDREN.** It is no defense to an action of ejectment by the minor children for the recovery of the possession of the homestead, that the defendant claims title from a purchaser at a foreclosure sale under a mortgage given by the widow. Under Wagner's Statutes, page 698, section 5, the minor children, until they attain their majority, are entitled to the exclusive possession of the homestead as against the widow's vendee. *Kochling v. Daniel*, 54.
3. **EJECTMENT: COMPENSATION FOR IMPROVEMENTS.** A defendant in ejectment can obtain compensation for improvements only in the manner provided by Revised Statutes, sections 2259, 2260. *Jasper County v. Wadlow*, 172.
4. **POSSESSION, FRIENDLY, ADVERSE: BURDEN OF PROOF.** Where one who is in possession of land is present at its sale by another, and makes no claim to it, such possession, continued after the sale, will be deemed to be subordinate and friendly to the purchaser, and cannot be changed into an adverse holding so as to permit the running of the bar of the statute of limitations, until a knowledge of its adverse character is brought home to the purchaser, and the burden of showing such change and knowledge is on the party so claiming adverse possession. *Wilkerson v. Thompson*, 317.
5. **TAXES: LIEN OF THE STATE FOR SUPERIOR: JUNIOR OR INFERIOR INCUMBRANCE: EJECTMENT.** The lien of the State for taxes takes pre-

cedence of and is superior to all other liens, whether prior or subsequent. But in a suit to enforce such lien, the holder of a junior or inferior incumbrance must be made a party, if it is desired to divest him of his rights; otherwise he will be entitled to redeem from the purchaser under the superior or tax lien. And the trustee is not a competent party to foreclose by suit, without joining the beneficiary with him. But the purchaser under the superior lien has the superior legal title, which the holder of the junior or inferior lien cannot successfully resist in an action of ejectment for the recovery of possession. *Stafford v. Fizer*, 393.

6. **EJECTMENT: SENIOR PATENT.** In ejectment, where the issue under the pleadings is one at law, a senior patent will prevail over a junior one. *Cunningham v. Snow*, 587.
7. **LANDLORD AND TENANT: LEASE: NOTICE TO QUIT: ESTOPPEL: EJECTMENT.** Where a railroad company in proceedings to condemn land for a right of way pays the damages assessed to the circuit clerk for the owner, but upon allowance by the court of the latter's exceptions, voluntarily withdraws the money and enters into an agreement with the owner whereby it leased the land from the latter for a term of years, with stipulation to quit upon notice given, the relation of landlord and tenant is thereby created, and the railroad company is estopped to deny the landlord's title and right of possession. And if the stipulated notice to quit is given, the owner has a right of action to recover possession, either under the landlord and tenant act, or by ejectment. *Green v. The Missouri Pacific Railway Company*, 653.
8. —: **FORECLOSURE: SALE: RIGHTS OF PURCHASER: POSSESSION.** Where the relation of landlord and tenant exists between parties, and the landlord's right of possession is taken away by foreclosure and sale under a deed of trust, the purchaser at such sale succeeds to the rights of the landlord, and on the expiration of the lease may maintain an action for possession of the premises. *Ib.*

SEE EXECUTIONS, 4.

LAND AND LAND TITLES, 3.

LIMITATIONS, 6.

PRACTICE IN SUPREME COURT, 1.

EQUITY

1. **EQUITY: STATUTE OF FRAUDS: SPECIFIC PERFORMANCE.** Where one in pursuance of and on the faith of an oral promise of the owner that he shall have a deed for land, enters into possession and makes valuable improvements, the case is taken out of the statute of frauds, and he is entitled to a decree for specific performance. *Anderson v. Shockley*, 250.
2. **EXCHANGE OF LANDS: DEED OF TRUST, TRANSFER OF: EQUITY: VENDOR'S LIEN: HOMESTEAD: DOWER.** Where B. and D. exchanged lands, D. promising to transfer a deed of trust, in which his wife

had not joined, from the land traded B. to that received from B. but died insolvent without making the transfer, and B. lost the land obtained from D. by sale under the trust deed, equity will give B. a lien on the land traded to D. for the purchase price thereof, and the homestead and dower right of D.'s widow will be subject to each lien. But B. having quit-claimed to the *cestui que trust* for \$500, after the trust sale, for the purpose of divesting the widow of her dower, his vendor's lien will be reduced that amount. *Bennett v. Shipley*, 448.

3. EQUITY: GIFT: UNDUE INFLUENCE. A gift, disproportioned to her means, made by an aged widow, of a note payable to her, to a church, at the solicitation of its pastor, who was, also, her spiritual and business adviser, and without disinterested advice from others upon the condition, which the deed of gift omitted to recite, that she was to receive the interest on the note during her life, will, at her suit in equity, be set aside. *Caspari v. The First German Church of the New Jerusalem*, 649.

SEE PRACTICE IN SUPREME COURT, 7.

ESTOPPEL.

1. STOCKHOLDER: ESTOPPEL. One who voluntarily places himself on the books of a corporation as the owner of its stock, will be estopped to deny his title thereto as against its creditors. *Erskine v. Loewenstein*, 301.
2. ESTOPPEL. Silence, in the absence of knowledge of one's rights, will not work an estoppel. *Frederick v. The Missouri River, Ft. Scott & Gulf Railroad Company*, 402.
3. CONTRACT: ESTOPPEL. A party cannot enjoy the fruits of a contract through a series of years, and then be heard to repudiate its obligations. *Green v. The Missouri Pacific Railway Company*, 653.

SEE CONDEMNATION OF PROPERTY, 7.

EVICITION.

SEE LANDLORD AND TENANT, 4, 5.

EVIDENCE.

1. MISTAKE IN WRITTEN CONVEYANCE, EVIDENCE TO ESTABLISH. It requires the same strength of evidence to establish a mistake in a written conveyance as to establish a trust. *Modrell v. Riddle*, 31.
2. HUSBAND AND WIFE, MONEY OF LATTER: RESULTING TRUST, EVIDENCE TO ESTABLISH. Prior to the act of 1875, money of the wife, not her separate estate, became the property of the husband *jure mariti*, and if invested in land by him, no resulting trust would be thereby credited in favor of the wife or those claiming under her

To establish such a trust the evidence must be clear, strong and unequivocal; loose declarations of the husband are not sufficient, and testimony of verbal admissions of persons since dead is entitled to but small weight. *Ib.*

3. EXECUTORS AND GUARDIANS: ANNUAL SETTLEMENTS: EVIDENCE. Annual settlements of guardians and executors do not constitute *prima facie* evidence in their behalf. *The State to the use of Koch v. Roeper*, 57.
4. PRACTICE, CRIMINAL: EVIDENCE. To rebut the presumption of guilt arising from flight, a defendant in a criminal case has the right to show that his life was threatened by the relatives of the deceased, and in such case it is error to refuse to allow him to show the desperate and dangerous character of the persons making the threats. *The State v. Barham*, 67.
5. ———: ———: ACT OR DECLARATION OF CO-DEFENDANT. No act or declaration of one co-defendant, after the common enterprise is ended, can be given in evidence against his co-conspirator being separately tried. *Ib.*
6. RAILROADS: COLLISION, EVIDENCE OF. Where there is no evidence of a collision between a railroad train and an animal alleged to have been killed by such train, there can be no recovery. But such collision need not be shown by direct testimony, but may be inferred from the facts and circumstances in evidence. *Halferty v. The Wabash, St. Louis & Pacific Railway Company*, 90.
7. EVIDENCE: RES GESTAE: ANIMUS. The testimony, on a trial for murder, of a witness present at the difficulty, that while he was endeavoring to quiet the defendant the latter struck the witness, was admissible in evidence as part of the *res gestae*, and as tending to show the *animus* of defendant. *The State v. Ramsey*, 133.
8. ———: MANNER OF DECEASED. Evidence that the deceased, after the first encounter and while standing near its place, just before the second and fatal encounter "looked scared" and "looked as if he wanted to get away," was admissible on behalf of the State. ¹²
9. DRUNKENNESS, EVIDENCE AS TO INADMISSIBLE. The trial court committed no error in refusing to permit a witness to state whether defendant was drunk or sober at the time of the killing, as drunkenness neither excuses nor extenuates crime. *Ib.*
10. EVIDENCE, DESTRUCTION OF: INFERENCE. Every inference is to be drawn against a party to a suit guilty of destroying or mutilating documentary evidence. *Hays v. Bayliss*, 209.
11. EVIDENCE: OFFER OF COMPROMISE. Evidence, relating to an offer of compromise made after the controversy between the parties arose, is inadmissible. *Smith v. Shell*, 215.
12. ———. IMMATERIAL ERROR. The admission of irrelevant evidence in a trial by the court, is no ground for the reversal of a judgment, where it appears that without regard to such evidence it was

for the right party, and that a new trial would not change the result. *Anderson v. Shockley*, 200.

13. SEDUCTION: ACTION BY PARENT FOR LOSS OF SERVICE. EVIDENCE. Proof of promise of marriage is not permissible in an action by a parent for the loss of service of his daughter caused by her seduction. *Comer v. Taylor*, 341.
14. EVIDENCE: AGREEMENT BETWEEN PARTIES TO SUIT. An agreement between parties plaintiff and defendant litigating the title to land, made for the purpose of effecting an amicable disposition of the crops and rents and securing the *terre tenant* in possession for the remainder of the year, whichever party should prevail in the controversy and which, by its terms, was not to affect the rights of the parties to the title, cannot be invoked for the purpose of prejudicing the rights of either party to such litigation. *Stafford v. Fizer*, 393.
15. CONTRACT: CONSIDERATION, PROOF OF DIFFERENT ONE. Where an executory contract recites a consideration which is shown to be nominal or unreal, the real consideration can be shown for the purpose of supporting the contract. *Moore v. Ringo*, 468.
16. CONTRACT: BAWDY HOUSE: EVIDENCE. A contract to sell a house to one whose purpose is to keep a bawdy house, is not unlawful, and a suit to enforce it cannot be defeated by proof that it was really a contract of lease, and, therefore, invalid. *Sprague v. Rooney*, 493.
17. PAROL EVIDENCE, WHEN INADMISSIBLE. Parol evidence is inadmissible to substitute an invalid parol agreement for a valid one in writing under seal. *Ib.*
18. FOREIGN WILL: EVIDENCE. A will of a sister state is not inadmissible in evidence here, because it has not been admitted to probate or recorded in the probate court of this state. *Gaines v. Fender*, 497.
19. ———: ———. The will in this case, which was made in Kentucky, held admissible in evidence here, against the objection that its admission to probate in Kentucky was not sufficiently authenticated. *Ib.*
20. PRACTICE, CRIMINAL: EVIDENCE: INTENT. In a prosecution under Revised Statutes, section 1561, for obtaining property by means of a trick and fraud, acts of the defendant similar to the one for which he is being tried, committed on the same day and in the same town, are admissible against him for the purpose of showing the intent with which the act was done. *The State v. Myers*, 558.
21. CONVEYANCE IN FRAUD OF CREDITORS: EVIDENCE. The acts and declarations of a debtor charged with the execution of a conveyance in fraud of creditors, made in the absence of the grantee, are admissible in evidence to prove the fraudulent purpose of the debtor. *Holmes v. Braidwood*, 610.
22. ———: ———. Knowledge on the part of the grantee of such fraudulent purpose of the debtor, may be shown by any circumstances tending to show participation in the designs of the latter,

and without proving the grantee's knowledge of particular acts and declarations so made by the grantor. *Ib.*

23. PLEADING: EVIDENCE. It is a general rule that in ordinary money demands the fact of payment is in the nature of new matter, and by our code inadmissible under a simple denial. *Wilkerson v. Farnham*, 672.
24. ———: ———. Under a general denial the defending party is always at liberty to disprove and overthrow the contract asserted against him, by proving that it was materially different from the one so asserted. *Ib.*

SEE LAND AND LAND TITLES, 3.

PRACTICE, CIVIL, 1.

PRACTICE IN SUPREME COURT, 5, 6.

RAILROADS, 9, 10, 11.

EXECUTIONS.

1. EXECUTION: SHERIFF: LEVY, TIME OF. As a general rule, a sheriff who has an execution in his hands has until the return day of the writ within which to execute it. There may, however, be special circumstances which will require an immediate levy in order to make the process available. *The State ex rel. Farwell v. Leland*, 260.
2. ———: ———: ———. It is the duty of the sheriff to make the levy within a reasonable time, in view of all the facts and circumstances of the case. *Ib.*
3. ———: LEVY: SHERIFF'S DEED. Where, under an execution issued on a joint judgment against two defendants, the sheriff levies on land as the property of one of them, and sells and conveys the interest of the latter, his deed will not pass to the purchaser any interest the other defendant may have in the land. *Frederick v. The Missouri River, Ft. Scott & Gulf Railroad Company*, 402.
4. EJECTMENT: FINDING OF TRIAL COURT. The evidence in this case held sufficient to support the finding and judgment of the trial court. *Ib.*
5. EXECUTION. A second execution should not be quashed merely because it is not entitled an "alias execution." *Bushong v. Taylor*, 671.

EXECUTORS.

SEE ADMINISTRATION.

FRAUD

1. **FRAUDULENT SALE: CREDITOR: DEBTOR.** A creditor cannot purloin the goods of his debtor at a price in excess of his debt, when he knows that the excess so paid such debtor is by the latter to be placed beyond the reach of his other creditors. Such purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not. *McVeagh v. Baxter*, 518.
2. **THE DECREE of the lower court setting aside a conveyance of land as being in fraud of creditors, affirmed.** *Goldsby v. Johnson*, 602.
3. **CONVEYANCE IN FRAUD OF CREDITORS: EVIDENCE.** The acts and declarations of a debtor charged with the execution of a conveyance in fraud of creditors, made in the absence of the grantee, are admissible in evidence to prove the fraudulent purpose of the debtor. *Holmes v. Braidwood*, 610.
4. ———: ———. Knowledge on the part of the grantee of such fraudulent purpose of the debtor, may be shown by any circumstances tending to show participation in the designs of the latter, and without proving the grantee's knowledge of particular acts and declarations so made by the grantor. *Ib.*
5. ———: PARTICIPATION IN BY GRANTEE. The mere knowledge of a creditor, who takes his goods in payment of an existing *bona fide* debt, of a desire and purpose of a debtor in making the sale to delay his other creditors, is not sufficient to invalidate the transfer. It must further appear that the creditor participated in the fraud, as that there was a purpose on his part, beyond the mere effort to collect his own debt, to aid the debtor in defeating or delaying his other creditors, or to protect the debtor as well as himself. *Ib.*

SEE STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

SEE FRAUD, 2, 3, 4, 5.

GUARDIAN AND WARD.

1. **GUARDIAN: BOND, ACTION ON BEFORE FINAL SETTLEMENT.** A ward who has attained his majority, may sue on his guardian's bond before the latter has made final settlement in the probate court. *The State to the use of Koch v. Roeper*, 57.
2. **PARTITION: GUARDIAN AD LITEM, POWERS OF.** A guardian *ad litem* of an infant in a partition suit, has authority to bind his ward by a stipulation in the nature of a waiver of proof. *LeBourgeoise v. McNamara*, 189.
3. ———: ———: ———. Under the statute, (2 Wag. Stat., p. 973, §§ 48, 49,) a guardian *ad litem* of an infant in a partition proceeding,

seems to be clothed with the full powers of his ward after removal of disabilities. *Ib.*

SEE WILLS, 1.

HOMESTEADS AND EXEMPTIONS.

HOMESTEAD: CONVEYANCE BY WIDOW: MINOR CHILDREN. It is no defense to an action of ejectment by the minor children for the recovery of the possession of the homestead, that the defendant claims title from a purchaser at a foreclosure sale under a mortgage given by the widow. Under Wagner's Statutes, page 698, section 5, the minor children, until they attain their majority, are entitled to the exclusive possession of the homestead as against the widow's vendee. *Kochling v. Daniel*, 54.

SEE LAND AND LAND TITLES, 5.

HOMICIDE.

SEE INSTRUCTIONS, 2.

HUSBAND AND WIFE.

1. **DEED: HUSBAND AND WIFE: SURVIVOR.** By a deed executed to husband and wife they become seized in entirety of the land conveyed, and the survivor takes the whole estate. *Modrell v. Riddle*, 31.
2. **HUSBAND AND WIFE, MONEY OF LATTER: RESULTING TRUST, EVIDENCE TO ESTABLISH.** Prior to the act of 1875, money of the wife, not her separate estate, became the property of the husband *jure mariti*, and if invested in land by him, no resulting trust would be thereby created in favor of the wife or those claiming under her. To establish such a trust the evidence must be clear, strong and unequivocal; loose declarations of the husband are not sufficient, and testimony of verbal admissions of persons since dead is entitled to but small weight. *Ib.*
3. **JOINTURE: DOWER: STATUTE.** A post-nuptial contract for jointure in lieu of dower, provided for by Revised Statutes, section 2202, has no binding force on the wife until, by some act of hers after discovery, she acquiesces in or accepts the provision made for her benefit in such contract. She may, under said section 2202 renounce the jointure and have dower, but cannot claim both. *Roberts v. Walker*, 200.
4. **—: —.** A husband and wife can agree to annul his marital rights as to personal property which came to him in her right before the married woman's act of 1875, (Acts, p. 61,) and to re-transfer it to her as a suitable provision in lieu of dower in his estate. *Ib.*
5. **HUSBAND AND WIFE: ALIENATION OF WIFE'S AFFECTION, ACTION FOR.** An action lies in behalf of a husband for the alienation with malice

or improper motives of his wife's affections. Neither debauchery nor enticing her away from him is necessary to a recovery in such action. *Rinehart v. Bills*, 534.

6. ———: ———: ———. The alienation of a wife's affections for which the law gives redress, may be accomplished, notwithstanding her continued residence under his roof. *Ib.*
7. ———: LAND, PURCHASE OF IN PART WITH WIFE'S MONEY: TRUST. A husband received from his wife money arising from the sale of her real estate, under an agreement to invest it in land in her name. He purchased land, paying for it in part with her money and in part with his own and took the title in his own name; *Held*, that the wife was entitled to have in her own right, exempt from subjection to the husband's debts, such portion of the land as the amount of her money paid thereon bore to the whole sum paid. *Bowen v. McKean*, 594.

SEE DAMAGES, 1.

INDEPENDENT CONTRACTOR.

SEE MASTER AND SERVANT.

INFANTS.

SEE GUARDIAN AND WARD.

INJUNCTION.

1. CONTRACT IN RESTRAINT OF TRADE, VIOLATION OF: INJUNCTION. A contract not to engage in a particular kind of business, at a specified place for a limited time, is not invalid as being in restraint of trade, and injunction lies to restrain its violation. *Gill v. Ferris*, 156.
2. INJUNCTION: MISJOINDER OF PLAINTIFFS. A misjoinder of plaintiffs in an injunction suit, is not a ground for dissolving the injunction. *Ib.*
3. ———: BOND: DAMAGES. An assessment of damages for defendant upon the dissolution of an injunction, cannot be made except as incident to a bond or stipulation given by plaintiff to pay the damages consequent upon such dissolution. *The City of St. Louis v. The St. Louis Gaslight Company*, 349.

INSTRUCTIONS.

1. PRACTICE IN SUPREME COURT: INSTRUCTIONS. The Supreme Court will not consider any objection to instructions which is made for the first time in that court. It is not error to refuse instructions when there is no evidence upon which to base them, or where they ignore material issues in the case or are embraced in others given. *Carlisle v. The Keokuk Northern Line Packet Company*, 40.

2. PRACTICE, CRIMINAL: DUTY OF COURT TO INSTRUCT JURY. It is the duty of the court to instruct the jury as to all the grades of homicide to which the facts in evidence will apply. *The State v. Barham*, 67.
3. PRACTICE: RELIEF FROM APPELLANT'S OWN ERROR: INSTRUCTION. A party cannot insist upon a reversal of a judgment because of error in his own instruction. *Clifton v. Sparks*, 115.
4. MURDER: INSTRUCTIONS. Where, on trial for murder, the evidence on behalf of the State tended to establish that the difficulty, which resulted in the death of the deceased, was sought for and brought on by defendant, and that after having provoked, he took advantage of it and fatally stabbed the deceased, and that on the part of defendant tended to prove self-defense; *Held*, that the instructions of the court were properly confined to murder in the first and second degrees, and to justifiable and excusable homicide. *The State v. Ramsey*, 133.
5. INSTRUCTIONS. Instructions are properly refused which are repetitions of others already given, or are based on issues not raised by the pleadings. *Gordon v. Madden*, 193.
6. ———: ASSUMING FACTS. An instruction which assumes the truth of a controverted fact in issue, should not be given. *Wilkerson v. Thompson*, 317.
7. ———. Instructions should not assume the truth of controverted facts. *Comer v. Taylor*, 341.
8. THE OBJECTION that the jury took with them to their room a refused instruction of the opposite party, is made too late in the motion for a new trial. *Lewis v. McDaniel*, 577.
9. INSTRUCTIONS: ESTOPPEL. Appellant cannot complain of an error in an instruction given for the opposite party, when his own instructions contain the same error. *Holmes v. Braidwood*, 610.
10. INSTRUCTIONS, AMENDMENT OF: EXCEPTIONS. Where the court amends instructions asked by a party, and gives them as amended, it is equivalent to a refusal of them, and gives the party the full benefit of his exceptions to the action of the court. *Allen v. Mansfield*, 688.

SEE SLANDER, 4.

INTEREST.

- INTEREST: TEN PER CENT, ERROR IN ALLOWING. Where the petition does not allege that the contract sued on is in writing, or that it provided for the payment of ten per cent interest on the debt sued for, and the prayer of the petition not demanding interest, the court cannot allow ten per cent interest in its judgment. *Ashby v. Shaw*, 76.

JOINTURE.

1. **JOINTURE: DOWER: STATUTE.** A post-nuptial contract for jointure in lieu of dower, provided for by Revised Statutes, section 2202, has no binding force on the wife until, by some act of hers after discovery, she acquiesces in or accepts the provision made for her benefit in such contract. She may, under said section 2202 renounce the jointure and have dower, but cannot claim both. *Roberts v. Walker*, 200.
2. ——— : ———. A husband and wife can agree to annul his marital rights as to personal property which came to him in her right before the married woman's act of 1875, (Acts, p. 61,) and to re-transfer it to her as a suitable provision in lieu of dower in his estate. *Ib.*

JUDGMENTS.

1. **INTEREST: TEN PER CENT, ERROR IN ALLOWING.** Where the petition does not allege that the contract sued on is in writing, or that it provided for the payment of ten per cent interest on the debt sued for, and the prayer of the petition not demanding interest, the court cannot allow ten per cent interest in its judgment. *Ashby v. Shaw*, 76.
2. **JUDGMENT WITHOUT NOTICE: PRACTICE.** A judgment will be reversed where one of the defendants against whom it was rendered, was not served with summons and was not otherwise brought into court. *Jasper County v. Wadlow*, 172.
3. **PARTNERSHIP RELATION: JUDGMENT: THIRD PERSONS.** A judgment in a suit determining the existence or non-existence of a co-partnership relation between the parties thereto, is not binding on or admissible in evidence against strangers to such proceeding. *McDonald v. Matney*, 358.
4. **JUDGMENT, WHEN NOT A BAR.** A judgment is not a bar to another action, when it does not appear that the subject matter of the two actions is the same. *The State ex rel. Richardson v. James*, 509.
5. **TRUSTEE: JUDGMENT: RES JUDICATA.** A judgment of a court of competent jurisdiction, settling the accounts of a trustee and discharging him from the trust, becomes *res judicata*, and is not subject to collateral attack. *Peake v. Jamison*, 552.
6. **JUDGMENT, SATISFACTION OF.** A note, secured by a deed of trust on land, given and accepted in satisfaction of a judgment, is a payment of the latter. *Bushong v. Taylor*, 630.

SEE LAND AND LAND TITLES, 4.

JUDICIAL DISCRETION.

SEE MANDAMUS, 1.

PRACTICE, CIVIL, 11, 12.

JURISDICTION.

1. APPEALS FROM ST. LOUIS COURT OF APPEALS: CONSTITUTIONAL QUESTIONS: JURISDICTION. In cases in which appeals lie from the St. Louis court of appeals, only because constitutional questions are involved, the Supreme Court has jurisdiction to consider those questions only. *Humes v. The Missouri Pacific Railway Company*, 221.
2. TEMPORARY JUDGE: JURISDICTION. A judge from another circuit who was temporarily present for the purpose of and was engaged in the trial of a particular case, in another cause which was pending before the regular judge, and in which the jury had retired to make their verdict, on their return into court and in the absence of the defendant and his counsel, verbally instructed them as to the form of their verdict, received the same, which was for plaintiff, and discharged them. *Held*, that he had no jurisdiction in the cause, and the judgment should be reversed. *Allen v. Snyder*, 256.
3. APPEAL FROM ST. LOUIS COURT OF APPEALS: AMOUNT IN DISPUTE: JURISDICTION. In a case appealed from the circuit court of St. Louis county to the St. Louis court of appeals, it appeared that the plaintiff sued for an amount in excess of \$2,500, but the answer of the defendant pleaded a judgment and satisfaction as to a part of the amount sued for, which, if true, was sufficient to reduce plaintiff's claim to less than \$2,500, to which plea plaintiff demurred, and his demurrer being overruled, stood on it, and judgment was entered thereon against him; *Held*, that the demurrer admitted the recovery of the amount as alleged in the answer, that the matter in dispute on the appeal was, therefore, less than \$2,500, and that no appeal would lie to the Supreme Court. *Kerr v. Simmons*, 269.
4. PRACTICE: APPEARANCE: JURISDICTION. The appearance of a defendant in the circuit court, on appeal from a justice of the peace, for the sole purpose of filing a plea in abatement, is not such an appearance to the action as to forbid his raising the question of jurisdiction. And where it appears he was served with summons in the township where he resided, which does not adjoin that in which suit was brought, the action should be dismissed on his motion. R. S., § 2839. *Fare v. Gunter*, 522.

SEE MUNICIPAL CORPORATIONS, 4.

PRINCIPAL AND SURETY, 2.

JURY.

SEE PRACTICE, CRIMINAL, 6.

JUSTICES' COURTS.

SEE APPEALS, 1.

LAND AND LAND TITLES.

1. APPURTENANCE, WHAT IS. The term "appurtenance" carries with it no right or interest in property on other lands of the grantor not included in the deed under which the grantee claims. It cannot be made to include anything not situated on the land described, although it belong to the grantor and be used by him in his business. *Barrett v. Bell*, 110.
2. ———. A kettle situated upon a lot not included in the lease of hotel property, and not indispensable to its enjoyment, although a convenience to such property, and used by the grantor in connection therewith, is not an appurtenance thereto, and the grantee may, at any time, be deprived of its use by the grantor. *Ib.*
3. SWAMP LAND, SELECTION OF: TITLE: EVIDENCE. The report of the Secretary of the Interior of the United States to the State, confirming land as swamp land, and the patent of the land by the State to a county, vests the title in the latter; and in ejectment by the county to recover the land, the defendant cannot assail such title by showing that the land was not in fact swamp land, and that the Secretary of the Interior had made a mistake in confirming it as such. *Jasper County, v. Wadlow*, 172.
4. JUDGMENT FOR TAXES, PURCHASER UNDER: WHAT INTEREST HE ACQUIRES. A sale and deed of land under a judgment for taxes, is only effectual to pass the title of the parties to the tax suit. If, at the time of such sale, the defendant had only a right to a deed on the payment of the purchase money, that is all the interest the purchaser at the sale would acquire. *Ib.*
5. EXCHANGE OF LANDS: DEED OF TRUST, TRANSFER OF: EQUITY: VENDOR'S LIEN: HOMESTEAD: DOWER. Where B. and D. exchanged lands, D. promising to transfer a deed of trust, in which his wife had not joined, from the land traded B. to that received from B.; but died insolvent without making the transfer, and B. lost the land obtained from D. by sale under the trust deed, equity will give B. a lien on the land traded to D. for the purchase price thereof, and the homestead and dower right of D.'s widow will be subject to such lien. But B. having quit-claimed to the *cestui que trust* for \$500, after the trust sale, for the purpose of divesting the widow of her dower, his vendor's lien will be reduced that amount. *Bennett v. Shipley*, 448.
6. LAND, CONTRACT FOR SALE OF. A contract in writing for the sale of land, need not all be contained in one instrument signed by the vendor. *The Young Men's Christian Association of Kansas City v. Du-bach*, 475.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT: LEASE: NOTICE TO QUIT: ESTOPPEL: EJECTMENT. Where a railroad company in proceedings to condemn land for a right of way pays the damages assessed to the circuit clerk for the owner, but upon allowance by the court of the latter's exceptions, voluntarily withdraws the money and enters into an agree-

ment with the owner whereby it leased the land from the latter for a term of years, with stipulation to quit upon notice given, the relation of landlord and tenant is thereby created, and the railroad company is estopped to deny the landlord's title and right of possession. And if the stipulated notice to quit is given, the owner has a right of action to recover possession, either under the landlord and tenant act, or by ejectment. *Green v. The Missouri Pacific Railway Company*, 653.

2. ———: FORECLOSURE: SALE: RIGHTS OF PURCHASER: POSSESSION. Where the relation of landlord and tenant exists between parties, and the landlord's right of possession is taken away by foreclosure and sale under a deed of trust, the purchaser at such sale succeeds to the rights of the landlord, and on the expiration of the lease may maintain an action for possession of the premises. *Ib.*
3. ———: IMPROVEMENTS: COUNTER-CLAIM. In the absence of an express promise to pay, no recovery can be had by a tenant for improvements made by him. Where there is an express promise it is a proper subject of counter-claim *ex contractu*. *Wilkerson v. Farnham*, 672.
4. PAROL LICENSE TO OCCUPY LAND: TENANT AT WILL: NOTICE: EVICTION. A parol license to one by the owner of land that the licensee may occupy the land during the latter's natural life, is revocable at the will of the owner. Such licensee is a tenant at will, and entitled to notice to quit before he can be evicted. *Allen v. Mansfield*, 688.
5. ———: IMPROVEMENTS: EVICTION. Where one is induced by the owner of land to occupy the same for a permanent home, and while upon it makes improvements not severable from the freehold, such improvements so made give the holder such right and interest in the use of the property, that neither the owner nor his heirs and assigns can put him off without compensating him for such improvements. *Ib.*

SEE RAILROADS, 24.

LEASE.

SEE CONDEMNATION OF PROPERTY, 7.

LICENSE.

SEE MUNICIPAL CORPORATIONS, 2.

LIEN.

1. CHAIN OF TITLE: VENDOR'S LIEN: NOTICE. A recital in a deed in a purchaser's chain of title that a part of the purchase money therefor is unpaid, is notice to him of a vendor's lien, and puts him on inquiry as to every fact that the existence of the lien would imply or lead to. *Tydings v. Pitcher*, 379.

2. ———: ———. Such purchaser is put upon inquiry as to the fact that the lien may have been extinguished by an unrecorded deed reconveying the premises to the former owner. *Ib.*
3. TAXES: LIEN OF THE STATE FOR SUPERIOR: JUNIOR OR INFERIOR INCUMBRANCE: EJECTMENT. The lien of the State for taxes takes precedence of and is superior to all other liens, whether prior or subsequent. But in a suit to enforce such lien, the holder of a junior or inferior incumbrance must be made a party, if it is desired to divest him of his rights; otherwise he will be entitled to redeem from the purchaser under the superior or tax lien. And the trustee is not a competent party to foreclose by suit, without joining the beneficiary with him. But the purchaser under the superior lien has the superior legal title, which the holder of the junior or inferior lien cannot successfully resist in an action of ejectment for the recovery of possession. *Stafford v. Fizer*, 393.
4. VENDOR'S LIEN: PURCHASE MONEY. A vendor's lien upon land for the purchase money therefor exists independent of any agreement to that effect between the contracting parties. *Bennett v. Shipley*, 448.
5. EXCHANGE OF LANDS: DEED OF TRUST, TRANSFER OF: EQUITY: VENDOR'S LIEN: HOMESTEAD: DOWER. Where B. and D. exchanged lands, D. promising to transfer a deed of trust, in which his wife had not joined, from the land traded B. to that received from B. but died insolvent without making the transfer, and B. lost the land obtained from D. by sale under the trust deed, equity will give B. a lien on the land traded to D. for the purchase price thereof, and the homestead and dower right of D.'s widow will be subject to such lien. But B. having quit-claimed to the *cestui que trust* for \$500, after the trust sale, for the purpose of divesting the widow of her dower, his vendor's lien will be reduced that amount. *Ib.*

LIMITATIONS.

1. EJECTMENT: STATUTE OF LIMITATIONS. The statute of limitations not only bars plaintiffs' recovery in an action of ejectment, but it also confers title on the occupant, which he may show under a general denial. *Fulkerson v. Mitchell*, 13.
2. POSSESSION, FRIENDLY, ADVERSE: BURDEN OF PROOF. Where one who is in possession of land is present at its sale by another, and makes no claim to it, such possession, continued after the sale, will be deemed to be subordinate and friendly to the purchaser, and cannot be changed into an adverse holding so as to permit the running of the bar of the statute of limitations, until a knowledge of its adverse character is brought home to the purchaser, and the burden of showing such change and knowledge is on the party so claiming adverse possession. *Wilkerson v. Thompson*, 317.
3. STATUTE OF LIMITATIONS: COUNTY. The law of this State in force in 1853 did not exempt a county from the bar of the statute of limitations running against it. *Cunningham v. Snow*, 587.

4. ———: INFANCY. When the statute of limitations has begun to run, neither infancy nor anything else will interrupt it. *Ib.*
5. SURETY: STATUTE OF LIMITATIONS. The statute of limitations begins to run against a surety, who pays the debt of his principal, from the time of such payment. *Bushong v. Taylor*, 660.
6. LIMITATIONS: ADVERSE POSSESSION: TITLE: EJECTMENT. Ten years consecutive adverse possession, under claim of title, gives the title to the occupant as effectually as any written conveyance. And the ten years' possession need not be the ten years next before the date of the action of ejectment. *Allen v. Mansfield*, 688.
7. STATUTE OF LIMITATIONS: WAIVER OF BENEFITS OF: TITLE. An agreement made after title has been perfected by operation of the statute of limitations to waive the benefits of the statute, is not effective, but the title remains in the party, who has thus acquired it, until he conveys it back with all the solemnities required in any deed to land. *Ib.*
8. IT WAS PROPER, under the circumstances of this case, to instruct the jury that if defendant did in fact surrender her title and consent to hold as tenant to plaintiff, they must find that she knew what she was doing. *Ib.*

MANDAMUS.

1. CORONER'S FEES: MANDAMUS. The allowance of fees to a coroner for an inquest on a dead body, is, under Revised Statutes, section 5157, subject to the judicial discretion of the county court, and cannot be controlled by a writ of mandamus. *The State ex rel. Patterson v. Marshall*, 484.
2. MANDAMUS. Mandamus does not lie where a remedy by appeal exists. *Ib.*

MASTER AND SERVANT.

1. NEGLIGENCE: INDEPENDENT CONTRACTOR. One who contracts with a furnace company to take sand from its land, and to deliver it at its furnace at an agreed price per load, there being no stipulation as to the manner of digging the sand, is an independent contractor, and the company is, therefore, not liable for his negligence in conducting the work. *Fink v. The Missouri Furnace Company*, 276.
2. INDEPENDENT CONTRACTOR, DEFINITION OF. An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Ib.*
3. MASTER AND SERVANT; MACHINERY: NEGLIGENCE. An employer should furnish to his servants good, safe and properly constructed machinery and implements for carrying on his business. By this

however, it is not meant that he is an insurer of their safety and under an absolute obligation to provide safe machinery and implements, but only that he is to use reasonable care and precaution in procuring them and in keeping them in good order. *Siela v. The Hannibal & St. Joseph Railroad Company*, 430.

- 4 THE doctrine applied to a case where the defendant furnished its servant with a defective hand car, and a series of instructions approved. *Ib.*

MEMORANDUM.

SEE CONTRACTS, 3, 4, 5.

METHODIST EPISCOPAL CHURCH.

SEE TRUSTS AND TRUSTEES, 10, 11, 12, 13, 14, 15.

MINOR.

SEE DAMAGES, 1.

HOMESTEADS AND EXEMPTIONS, 1.

MISJOINDER OF CAUSES OF ACTION.

SEE PLEADING, 5.

MISJOINDER OF PARTIES.

SEE INJUNCTION, 2.

MISTAKE.

SALE, MOTION TO SET ASIDE: MISTAKE OF OFFICER. A sheriff's sale will be set aside at the return day thereof for the mistake and oversight of the officer in making it, when shown to have operated injuriously to the interests of the complainant. *McKee v. Logan*, 524.

SEE EVIDENCE, 1.

MUNICIPAL CORPORATIONS.

1. CITY OF LIBERTY: CHARTER OF: POWER TO REGULATE SALE OF INTOXICATING LIQUOR. The city council of the city of Liberty had authority under its charter, (Acts 1860, 1861, pp. 213, 227; also Acts 1874, p. 336,) to pass an ordinance providing that no person should, directly or indirectly, sell or give away any intoxicating liquors in

any quantity less than one gallon within said city, without taking out a license as a dramshop keeper, and that any person violating said ordinance should be deemed guilty of a misdemeanor, and upon conviction, be punished by a fine of not less than \$10 nor more than \$90. *Schweitzer v. The City of Liberty*, 309.

2. MUNICIPAL CORPORATION: POWER TO TAX AND RESTRAIN SALE OF INTOXICATING LIQUOR. The power given to a city to tax and restrain the sale of liquor, includes the power to grant licenses. *Ib.*
3. ORDINANCE: PUBLICATION. Where a city charter provided that "all ordinances passed by the city council within thirty days after they become laws, shall be published, * * but the failure to publish * * shall not render void or affect the validity of any such ordinances, unless delay may cause such ordinances to act retrospectively on the rights of individuals," an ordinance passed by the city council goes into effect and becomes a law, notwithstanding the want of such publication. *Ib.*
4. JURISDICTION. The recorder of the city of Liberty has jurisdiction of offenses arising under the ordinance involved in this case. *Ib.*
5. MUNICIPAL CORPORATION: NUISANCE, ABATEMENT OF. A city cannot create a nuisance upon the property of a citizen and compel him to abate it. *The City of Hannibal v. Richards*, 330.
6. ———; CHARTER: PLEADING: ISSUE. The charter of a city, authorizing it to fill a lot on default made by the owner, gives it a demand against him for the cost of filling the lot, if done by the city, and the averment of the cost of the work is one upon which an issue may be made. *Ib.*
7. CONSTITUTION: SPECIAL LAW. The act of the general assembly, approved March 28th, 1881, authorizing cities acting under special charters, and containing more than 30,000 and less than 50,000 inhabitants, to establish a system of sewerage and to construct, establish and keep in repair sewers, culverts and drains, is not a special law, and as such, prohibited by the constitution. *Rutherford v. Heddens*, 388.
8. MUNICIPAL CORPORATION: TRESPASS: PEST-HOUSE. Where a city, which is authorized by its charter to purchase property beyond its limits for a pest-house, seizes property for that purpose without the consent of the owner, it is liable in damages for the trespass. *Dooley v. The City of Kansas*, 444.
9. SPECIAL TAX BILLS, ACTION ON: ORDINANCES. Where, in all material respects, the ordinances of a city relating to contracts for street improvement, and the issuance of special tax bills for cost of same, are complied with by the city authorities and the contractor, the latter can maintain his action for the amount of such tax bills. *Sheehan v. Owen*, 458.

MURDER.

MURDER: INSTRUCTIONS. Where, on trial for murder, the evidence on behalf of the State tended to establish that the difficulty, which resulted in the death of the deceased, was sought for and brought on by defendant, and that after having provoked, he took advantage of it and fatally stabbed the deceased, and that on the part of defendant tended to prove self-defense; *Held*, that the instructions of the court were properly confined to murder in the first and second degrees, and to justifiable and excusable homicide. *The State v. Ramsey*, 133.

SEE PLEADING, CRIMINAL, 3.

NEGLIGENCE.

1. **NEGLIGENCE: RAILROADS: KILLING STOCK.** In an action against a railroad for negligently running its train against and killing a cow, where the plaintiff only shows the injury and the passing of the train at a rate of twenty or twenty-five miles an hour along the place of the accident, which was over a tract of land inside of a village, midway between public thoroughfares 900 feet apart, he fails to make a case, and a demurrer to the evidence should be sustained. *Lord v. The Chicago, Rock Island & Pacific Railway Company*, 139.
2. ———: **REMOVING WALLS OF HOUSE: PETITION, SUFFICIENCY OF.** A petition in an action for damages caused by the falling of the walls of defendant's house, left standing after a fire, on the adjoining one of plaintiff, is good on demurrer, which charges the ownership and possession and control of the falling house to be in defendant, his knowledge of its condition, that he permitted and allowed certain persons to enter upon the premises for the purpose of removing the walls and chimneys and abating said nuisance, that said persons tore down said walls, and in doing so negligently and unskillfully pushed, or threw, or caused the same to fall over and upon said house occupied by the plaintiff, thereby causing the damage. *Dillon v. Hunt*, 150.
3. ———: **INDEPENDENT CONTRACTOR.** One who contracts with a furnace company to take sand from its land, and to deliver it at its furnace at an agreed price per load, there being no stipulation as to the manner of digging the sand, is an independent contractor, and the company is, therefore, not liable for his negligence in conducting the work. *Fink v. The Missouri Furnace Company*, 276.
4. **INDEPENDENT CONTRACTOR, DEFINITION OF.** An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Id.*
5. **COMMON CARRIERS: NEGLIGENCE.** A common carrier is not permitted to stipulate against its own negligence. Especially is this true in its carriage of passengers. *Tibby v. The Missouri Pacific Railway Company*, 292.

SEE MASTER AND SERVANT, 3.

PLEADING, 2.

RAILROADS, 18, 19.

NOTICE.

1. ORDER OF PUBLICATION: DEFECTS IN, WHEN NOT COLLATERALLY AS-SAILABLE. An order of publication of notice of a suit which requires the defendant "to appear on the first Monday, 1877, of the next term of the court to be holden in Carthage," is not so defective as to be subject to collateral attack. While the first Monday of the month on which the next term of the court was to be held was not directly named, it was so inferentially, as the law designated the first Monday of May, 1877, as the time when the next term of the court was to be held after the publication. *Jasper County v. Wadlow*, 172.
2. DEED: CHAIN OF TITLE: PURCHASER. A deed lying outside of a purchaser's chain of title, imparts no notice to him. *Tydings v. Pitcher*, 379.
3. CHAIN OF TITLE: NOTICE: PURCHASER. A purchaser is bound with constructive notice of all recorded instruments and recitals therein, lying within his chain of title. *Ib.*
4. ———: VENDOR'S LIEN: NOTICE. A recital in a deed in a purchaser's chain of title that a part of the purchase money therefor is unpaid, is notice to him of a vendor's lien, and puts him on inquiry as to every fact that the existence of the lien would imply or lead to. *Ib.*
5. SALE, MOTION TO SET ASIDE: NOTICE. All persons interested should have notice of a motion to set aside a sheriff's sale, otherwise their rights will in no manner be affected by the proceeding. But where the officer who made the sale has no direct interest in its maintenance, notice to him would not seem to be necessary. *McKee v. Logan*, 524.
6. ———: ———. Where the purchasers at the execution sale are present and resist the motion to set the same aside, they cannot be heard to complain of want of notice to the sheriff and the plaintiff in the execution. *Ib.*

SEE ADMINISTRATION, 9.

JUDGMENTS, 2.

LANDLORD AND TENANT, 4.

PRINCIPAL AND SURETY, 1.

NUISANCE.

SEE MUNICIPAL CORPORATIONS, 5.

PARENT AND CHILD.

SEE DAMAGES, 1.

PARTIES.

SEDUCTION UNDER PROMISE OF MARRIAGE: PARTY. The injured woman alone can maintain an action for seduction, accomplished under a breach of promise of marriage. *Comer v. Taylor*, 341.

PARTITION.

1. **PARTITION: GUARDIAN AD LITEM, POWERS OF.** A guardian *ad litem* of an infant in a partition suit, has authority to bind his ward by a stipulation in the nature of a waiver of proof. *LeBourgeois v. McNamara*, 189.
2. — : — : —. Under the statute, (2 Wag. Stat., p. 973, §§ 48, 49,) a guardian *ad litem* of an infant in a partition proceeding, seems to be clothed with the full powers of his ward after removal of disabilities. *Ib.*

PARTNERSHIP.

1. **PARTNERSHIP, WHAT ESSENTIAL TO.** The relation of partnership does not exist between persons associated in a common undertaking, unless each one has the right to manage the whole business and to dispose of the entire property involved in the enterprise for its purposes, in the same manner and with the same power as all can when acting together. *Ashby v. Shaw*, 76.
2. **PARTNERS, WHEN NOT.** One who receives a third of the profits of a firm as compensation for his services, and who is not liable for any of its losses, is not a partner. *Gill v. Ferris*, 156.
3. **PARTNERSHIP: CHANGE OF NAME.** The rights and liabilities of a partnership, as a rule, are not affected by a change in its name, unaccompanied by a change in its members. *Ib.*
4. **PARTNERSHIP RELATION: QUESTION OF FACT.** The question of the existence of the relation of partners between persons, is one of fact under proper instructions. *McDonald v. Matney*, 358.
5. — : JUDGMENT: THIRD PERSONS. A judgment in a suit determining the existence or non-existence of a co-partnership relation between the parties thereto, is not binding on or admissible in evidence against strangers to such proceeding. *Ib.*

- e. **PARTNERSHIP INTER SESE: QUESTION, HOW DETERMINED.** A mere participation in the profits and loss does not necessarily constitute a partnership between the parties so participating. The relation of partnership *inter sese*, is a question of intention on the part of the alleged partners, and is one to be determined by the triers of fact from all the circumstances proved. *Ib.*

PLEADING.

1. **PRACTICE, CIVIL: PLEADING: EVIDENCE.** A party cannot complain of the refusal of the trial court to strike out defenses contained in the answer, where the latter also contains a general denial, and evidence as to such defenses is admissible thereunder. *Fulkerson v. Mitchell*, 13.
2. **PLEADING: NEGLIGENCE.** A petition which charges, in substance that the defendant did not exercise due and proper care in the carriage of plaintiff's hogs, but on the contrary its officers, servants and agents carelessly, improperly and negligently managed and conducted defendant's steamboat, by reason of which careless, negligent and improper conduct of defendant, its officers, servants and agents said hogs were destroyed by fire and wholly lost to plaintiff, is sufficient. *Carlisle v. The Keokuk Northern Line Packet Company*, 40.
3. ———: **STATUTE OF FRAUDS.** The statute of frauds, to be availed of as a defense, must be specially pleaded. *Gordon v. Madden*, 193.
4. ———: **RAILROADS: DOUBLE DAMAGES.** A petition, in an action against a railroad under Revised Statutes, section 809, for double damages for killing stock, need not negative the fact that the place at which the animal entered upon the track was within the limits of an incorporated town or city. *Meyers v. The Union Trust Company*, 237.
5. ———: **MISJOINDER: WAIVER.** Actions *ex contractu* and *ex delicto* cannot be united under the code in the same petition, but the misjoinder must be taken advantage of before verdict. A motion at the close of plaintiff's evidence to compel him to elect, is not too late. *The Southworth Company v. Lamb*, 242.
6. ———: **DEFENSE PRO TANTO: DEMURRER.** Where defendant in his answer to an action for rent, alleges that plaintiff has already maintained one action against him predicated of the lease sued on, which recovery embraced part of the time for which recovery is sought, such fact so pleaded constitutes a good defense. Whether it is a bar to the whole action, or *pro tanto*, is a matter of law for the court, and being unquestionably good as a defense to a part of the cause of action, a demurrer thereto is properly overruled. *Kerr v. Simmons*, 269.
7. **MUNICIPAL CORPORATION: CHARTER: PLEADING: ISSUE.** The charter of a city, authorizing it to fill a lot on default made by the owner, gives it a demand against him for the cost of filling the lot, if done by the city, and the averment of the cost of the work is one upon which an issue may be made. *The City of Hannibal v. Richards*, 330.

8. CHAMPERTY: PLEADING. The defense of champerty must be specially pleaded. *Moore v. Ringo*, 468.
9. SPECIFIC PERFORMANCE: LAND: PLEADING. In an action for the specific performance of a contract to sell land, plaintiff need not allege the contract is in writing. *The Young Men's Christian Association of Kansas City v. Dubach*, 475.
10. RAILROADS: ILLEGAL FREIGHT CHARGES: PLEADING. In an action against a railroad company under Revised Statutes, chapter 21, article 3, for illegal charges of freight on saw-logs, a petition is sufficient which alleges that plaintiff shipped two car loads of saw-logs over defendant's road a distance of over twenty-five miles and under fifty, that the legal rates were a certain specified sum, that defendant charged and plaintiff paid a different specified sum, being an excess of \$3.20 over the legal rates allowed defendant, and asking judgment for the latter sum. *Burkholder v. The Union Trust Company*, 572.
11. SLANDER: PLEADING. In an action for slander words spoken on different occasions may be set forth in one count, and included in the same cause of action. *Lewis v. McDaniel*, 577.
12. PLEADING: COUNTER-CLAIM. In an action upon a promissory note damages arising out of a different transaction and constituting a cause of action *ex delicto*, cannot be set up as a counter-claim. *Wilkinson v. Farnham*, 672.
13. ———: EVIDENCE. It is a general rule that in ordinary money demands the fact of payment is in the nature of new matter, and by our code inadmissible under a simple denial. *Ib.*
14. ———: ———. Under a general denial the defending party is always at liberty to disprove and overthrow the contract asserted against him, by proving that it was materially different from the one so asserted. *Ib.*

SEE JURISDICTION, 3.

NEGLIGENCE, 2.

RAILROADS, 1, 2, 4, 10, 13, 23.

PLEADING, CRIMINAL.

1. PLEADING, CRIMINAL: INDICTMENT: DISTILLED LIQUOR. An indictment may be good which fails to charge an offense in the language of the statute creating it, provided words of equivalent meaning and import be used. And where an indictment charges the sale of "intoxicating liquor, to-wit, one pint of whisky," etc., it sufficiently describes the offense of selling "distilled liquor," within the meaning of the statute. *State v. Dengolensky*, 44.
2. ———: INDICTMENT: JEOPAILS. The defects of an indictment which fails to state the time and venue of an offense, are cured by the

statute of jeofails after verdict. R. S. 1879, § 1821. *State v. Hughes*, 86.

3. **CRIMINAL LAW: INDICTMENT FOR MURDER: PLACE OF WOUND, SUFFICIENCY AS TO.** An indictment for murder in the first degree, which, after the usual averments, charges that defendant "did strike, stab and thrust in and upon the right side of him, the said F., and, also, in and upon the back near the left shoulder of the body, giving to the said F. then and there with the knife aforesaid, in and upon the right side, and, also, upon the back near the left shoulder of him, the said F., one mortal wound of the length of two inches, of the breadth of half an inch and of the depth of three inches," etc., sufficiently locates the wound, and is not bad for repugnancy or inconsistency. *State v. Ramsey*, 133.
4. ———: **INDICTMENT: ROAD-OVERSEER.** An indictment under Revised Statutes, section 6944, against one as a road-overseer is sufficient which charges that defendant was, at the time of the commission of the offense, road-overseer of the district, and that it became and was his duty to keep a certain described public road in his district in repair, and that he did unlawfully and willfully fail and neglect to make certain specified repairs in said road, whereby he willfully failed and neglected to discharge his duty as such road-overseer. *State v. Walker*, 489.
5. **PLEADING, CRIMINAL: INDICTMENT: FRAUD; OWNERSHIP: VARIANCE.** An indictment under Revised Statutes, section 1561, for obtaining property by means of a trick and fraud, should charge it to belong to the true owner. But a variance in this particular upon the trial will not, under the statute, (R. S., § 1820,) be fatal, unless the trial court shall find it to be material to the merits of the case, or prejudicial to the defense of the defendant. *State v. Myers*, 558.

PLEDGE.

SEE BAILMENTS, 1, 2.

POSSESSION.

POSSESSION, FRIENDLY, ADVERSE: BURDEN OF PROOF. Where one who is in possession of land is present at its sale by another, and makes no claim to it, such possession continued after the sale, will be deemed to be subordinate and friendly to the purchaser, and cannot be changed into an adverse holding so as to permit the running of the bar of the statute of limitations, until a knowledge of its adverse character is brought home to the purchaser, and the burden of showing such change and knowledge is on the party so claiming adverse possession. *Wilkerson v. Thompson*, 817.

PRACTICE, CIVIL.

1. **PRACTICE, CIVIL: PLEADING: EVIDENCE.** A party cannot complain of the refusal of the trial court to strike out defenses contained in

the answer, where the latter also contains a general denial, and evidence as to such defenses is admissible thereunder. *Fulkerson v. Mitchell*, 13.

2. COUNTER-CLAIM : STATUTE. Under Revised Statutes, section 3522, in an action arising on contract, any other cause of action arising on contract and existing at the commencement of the action, may be pleaded by way of counter-claim. *Ashby v. Shaw*, 76.
3. PRACTICE : RELIEF FROM APPELLANT'S OWN ERROR : INSTRUCTION. A party cannot insist upon a reversal of a judgment because of error in his own instruction. *Clifton v. Sparks*, 115.
4. — : GENERAL VERDICT : WAIVER. The objection that the verdict is a general one in a case where the petition contains two counts, each stating a separate cause of action, must be pointedly called to the attention of the trial court, or the objection is waived. It is not sufficient that the motion in arrest of judgment states that upon the record the judgment is erroneous. *Persinger v. The Wash, St. Louis & Pacific Railway Company*, 196.
5. PETITION : ONE GOOD COUNT : PRACTICE. If either of two counts in a petition be good, the court should overrule the objection made at the trial to the introduction of any evidence because the petition fails to state a cause of action. *Roberts v. Walker*, 200.
6. — : FORMAL DEFECTS : PRACTICE. Where the petition states a cause of action, although defectively, or if it would be good after verdict, or on motion in arrest of judgment, defects in it cannot be reached by defendant's objecting at the trial to the introduction of evidence. *Ib.*
7. CORPORATION : STOCKHOLDER : MOTION FOR EXECUTION PRACTICE. A motion under the statute, (Wag. Stat., p. 291 § 13,) by a judgment creditor of a corporation, for execution against a stockholder for an unpaid subscription to its stock, is a substitute for a bill in equity to reach assets in the hands of the stockholder the refusal of the court to grant the motion is a finding of the issue for the defendant, and the remedy for error of the lower court in that regard is by a motion for a new trial and exception to the action of the court in overruling the latter motion. *Erskine v. Loewenstein*, 301.
8. — : — : — : —. It is not necessary that the bill of exceptions should show that the creditor excepted to the action of the court in overruling the motion for execution against the stockholder. *Ib.*
9. EXECUTION AGAINST STOCKHOLDER : TRIAL : STATUTE. The statute relating to such execution against a stockholder, contemplates a hearing and determination of the motion by the court, without the intervention of a jury. *Ib.*
10. TRIAL WITHOUT A JURY : INCOMPETENT EVIDENCE : REVERSAL. The rule, that the admission of incompetent evidence in a cause tried by the court without the intervention of a jury, will not cause a reversal if there is competent evidence sufficient to sustain the find

ing, has no application, unless it is obvious that the incompetent evidence did not induce the finding. *McDonald v. Matney*, 358.

11. JUDICIAL DISCRETION: FILING PLEADINGS OUT OF TIME. A trial court does not abuse its judicial discretion in permitting an answer to be filed nine days after the case is set for trial, but before default is entered and upon affidavit showing cause for the delay. *The State to the use of Stewart v. Matlock*, 455.
12. CHANGE OF VENUE: PLAINTIFF'S APPLICATION, TIME FOR MAKING. A plaintiff who asks for a change of venue because of the alleged undue influence of the defendant over the mind of the trial judge, must make his application therefor as soon as practicable, after receiving information of the undue influence complained of. Whether the application is so made within proper time, is a question resting in the sound discretion of the trial judge. *Ib.*
13. PRACTICE: LEGAL CAPACITY TO SUE: CORPORATION. The question of the legal capacity of plaintiff to sue as a corporation, must be raised by demurrer or answer, or it is waived. *The Young Men's Christian Association of Kansas City v. Dubach*, 475.
14. PRACTICE: APPEARANCE: JURISDICTION. The appearance of a defendant in the circuit court, on appeal from a justice of the peace, for the sole purpose of filing a plea in abatement, is not such an appearance to the action as to forbid his raising the question of jurisdiction. And where it appears he was served with summons in the township where he resided, which does not adjoin that in which suit was brought, the action should be dismissed on his motion. R. S., § 2839. *Fare v. Gunter*, 522.
15. ACTION, ABATEMENT OF. An action for slander does not abate, pending an appeal to the Supreme Court, by reason of the death of plaintiff in whose behalf the judgment was rendered. *Lewis v. McDaniel*, 577.
16. THE OBJECTION that the jury took with them to their room a refused instruction of the opposite party, is made too late in the motion for a new trial. *Ib.*
17. PRACTICE: DECLARATIONS OF LAW. The court, sitting as a jury in the trial of a cause, should not deny to a party declarations of law applicable to the facts of the case. *Cunningham v. Snow*, 587.

SEE SLANDER, 3.

SPECIFIC PERFORMANCE, 3.

TRUSTS AND TRUSTEES, 14.

PRACTICE, CRIMINAL.

1. PRACTICE, CRIMINAL: IMPROPER REMARKS OF COUNSEL: CONTINUANCE. Where counsel for the State has procured the refusal of defendant's application for a continuance, in a criminal case, on ac-

count of the absence of material witnesses, by admitting that the statements contained in the affidavit in support of the same should be read as the testimony of such absent witnesses, his assertion before the jury in his closing argument that it was not their evidence, that they had never seen the statements, and would not have sworn to them if they had been present, constitutes such a departure from legitimate argument and fair dealing, as to justify a reversal of the judgment. *State v. Barham*, 67.

2. PLEADING, CRIMINAL: PRACTICE, CRIMINAL: ALLEGATIONS: PROOF. In a criminal prosecution the time alleged in the indictment as the date of the commission of an offense, must be within the time prescribed for limiting the prosecution, and the proof must be of a day before the finding of the indictment and within the period prescribed for limitation. *State v. Hughes*, 86.
3. PRACTICE, CRIMINAL: VENUE. Where the bill of exceptions fails to show that the offense was proved to have been committed in the county where the indictment was preferred, the judgment will be reversed. *Ib.*
4. —: STATEMENT OF COUNSEL. Defendant's counsel, in stating his case to the jury, should not refer to matters irrelevant to the issues and incompetent as evidence. *State v. Ramsey*, 133.
5. REMARKS OF PROSECUTING ATTORNEY. Certain remarks of prosecuting attorney, in his closing argument, held to be justified by the evidence. *Ib.*
6. PRACTICE, CRIMINAL: JUROR, QUALIFICATION OF. One who has read the evidence taken before the coroner in a case of homicide, either as originally written or as printed in a newspaper, or who has read the evidence in a criminal cause on preliminary examination before a justice of the peace, and formed an opinion therefrom, in either case is, as matter of law, disqualified from serving as a juror in the trial of such cause. Such person can neither form one of the list of qualified jurors served on defendant before trial, nor one of the jury which tries the issue joined. *NORTON and RAY, JJ., dissenting. State v. Culler*, 623.

SEE EVIDENCE, 4, 5.

INSTRUCTIONS, 4.

PRACTICE IN SUPREME COURT.

1. PRACTICE IN SUPREME COURT: FINDING OF FACTS BY TRIAL COURT. The Supreme Court will not, in ejectment, disturb the finding of the trial court as to the fact of the execution and delivery of an alleged lost deed, where the evidence is conflicting and contradictory, and tends to prove both sides of the issue, unless the finding is caused by some error or misdirection of law. *Fulkerson v. Mitchell*, 13.
2. —: INSTRUCTIONS. The Supreme Court will not consider any objection to instructions which is made for the first time in that

court. It is not error to refuse instructions when there is no evidence upon which to base them, or where they ignore material issues in the case or are embraced in others given. *Carlisle v. The Keokuk Northern Line Packet Company*, 40.

3. BILL OF EXCEPTIONS: EVIDENCE. The action of the trial court relating to matters of evidence, unless preserved in the bill of exceptions, is not the subject of review in the Supreme Court. *State v. Ramsey*, 133.
4. PRACTICE IN SUPREME COURT: REFEREE'S REPORT. The Supreme Court will not interfere with the judgment of the lower court on the finding of a referee, where the evidence taken before him has not been preserved. *Hays v. Baylis*, 209.
5. ———: EVIDENCE, REVIEW OF ITS EXCLUSION. In order that a party may have the exclusion of evidence reviewed in the Supreme Court, the bill of exceptions must clearly show what he expected to prove, so that the appellate court may judge of its admissibility and materiality, or the questions must be such as to clearly indicate what the answer will be and what the party desires to prove. *State ex rel. Farwell v. Leland*, 260.
6. ———: ———: ———. An exclusion of an answer to a question will not work a reversal for the defendant where it appears that an answer responsive thereto would not establish the defense relied on. *Ib.*
7. EQUITY: PRACTICE IN SUPREME COURT. Even in equity in cases of conflicting evidence, the Supreme Court will defer to the finding of the trial judge. *Erskine v. Loewenstein*, 301.
8. TRIAL WITHOUT A JURY: INCOMPETENT EVIDENCE: REVERSAL. The rule, that the admission of incompetent evidence in a cause tried by the court without the intervention of a jury, will not cause a reversal if there is competent evidence sufficient to sustain the finding, has no application, unless it is obvious that the incompetent evidence did not induce the finding. *McDonald v. Matney*, 308.
9. PRACTICE: INSTRUCTIONS; MOTION FOR NEW TRIAL. The action of the lower court in giving and refusing instructions, will not be reviewed in the Supreme Court, unless it is assigned for error in the motion for new trial. *Gaines v. Fender*, 497.
10. SUPREME COURT, PRACTICE IN. The Supreme Court will not review facts passed upon by the lower court, sitting as a jury. *Ib.*
11. PRACTICE IN SUPREME COURT: EVIDENCE: EXCEPTIONS. The Supreme Court will not review the action of the trial court in admitting evidence, unless the bill of exceptions states the specific objection made to it, and clearly shows the fact or point in evidence which was the basis of the objection. *Holmes v. Braidwood*, 610.
12. ———: VERDICT. In a case where the evidence is conflicting, the Supreme Court will not disturb the finding of the trial court. *Pierce v. Chamberlain*, 618.

13. ———: EVIDENCE. Objection to the admission of evidence cannot be made for the first time in the Supreme Court. *Green v. Missouri Pacific Railway Company*, 653.
14. EVIDENCE, OBJECTION TO: PRACTICE IN SUPREME COURT. A party objecting to evidence must state his grounds therefor, and the bill of exceptions must show what was the specific objection urged against the admissibility of the given testimony before the trial court. Otherwise it cannot be known in the Supreme Court upon what the circuit court was asked to pass, and the former will not review its action. *Allen v. Mansfield*, 658.

SEE SLANDER, 1

PRESUMPTIONS.

EVIDENCE, DESTRUCTION OF: INFERENCE. Every inference is to be drawn against a party to a suit guilty of destroying or mutilating documentary evidence. *Hays v. Bayliss*, 209.

PRINCIPAL AND SURETY.

1. PRINCIPAL AND SURETY: NOTICE TO SUE FORMER: STATUTE. The requirement of the statute, (R. S., §§ 3896, 3897,) relating to the duty of a creditor to commence suit against the principal debtor within thirty days after a written notice from the surety to do so, is not complied with by merely commencing suit, but such suit must be proceeded in with due diligence, in the ordinary course of law, to judgment and execution against the principal debtor. *Sisk v. Rosenberger*, 46.
2. ———: ———: ———: WHEN MUST SUE IN THE CIRCUIT COURT. Where the creditor and surety reside in the same county, and the principal debtor in a different one, and the amount of the debt is within the jurisdiction of the circuit court, and the creditor, upon notice from the surety to proceed against the principal, may, therefore, sue both principal and surety jointly, in the circuit court of the county in which the latter resides, he should do so. He cannot, in such case, take judgment alone against the surety in a justice's court, unless the amount involved is within the exclusive jurisdiction of the justice. *Ib.*
3. ———: SUBROGATION. A surety for the trustees on their note for the payment of money advanced to build the church, who pays the obligation of his principals, is entitled to be subrogated to the rights of the trustees to subject the church to the payment of the debt. *Bushong v. Taylor*, 660.
4. SURETY: STATUTE OF LIMITATIONS. The statute of limitations begins to run against a surety, who pays the debt of his principal, from the time of such payment. *Ib.*
5. SURETY, PAYMENT OF DEBT BY: INTEREST. A surety who pays a judgment against himself for the debt of his principal, is entitled

to recover from the latter the rate of interest paid on the judgment to the time of payment and six per cent thereafter. *Ib.*

SEE ADMINISTRATION, 6. 8.

PROSECUTING ATTORNEY.

SEE PRACTICE, CRIMINAL, 5.

PROSTITUTION.

SEE CRIMINAL LAW, 3.

PUBLICATION.

SEE MUNICIPAL CORPORATIONS, 3.

NOTICE, 1.

QUO WARRANTO.

SEE CORPORATIONS, 6.

RAILROADS.

- 1 RAILROADS: KILLING STOCK: STATEMENT. A statement under the double damage act, (R. S., § 809,) for killing a cow, which alleges that she went on the track where the road runs adjoining inclosed fields and uninclosed prairie lands, where the road was entirely uninclosed, is sufficient, although it does not aver that the cow went upon the track by reason of the same being unfenced. *Briggs v. The Missouri Pacific Railway Company*, 37.
- 2 ———: ———: ———. The first count of a statement under Revised Statutes, section 809, containing two counts, is not bad for failure to contain a prayer for relief, where it alleges the killing and value of the cow, and the second count concludes in the same manner, but is followed by a statement of the aggregate value of both animals, and asks for judgment for double that amount. The concluding paragraph is to be regarded as a part of each count. *Ib.*
3. APPEAL: JUSTICE: RAILROAD. A railroad which runs through a county and has been sued therein by service of process on its local agent, is a resident of such county within the meaning of Revised Statutes, section 3041, relating to appeals from justices of the peace, and must prosecute such appeals within the time limited to other residents of the county. *Crutsinger v. The Missouri Pacific Railway Company*, 64.
4. RAILROADS: DOUBLE DAMAGES; STATEMENT. A statement in an action brought against a railroad before a justice of the peace for double damages for killing stock, is, after verdict, sufficient in that regard

if it avers that the stock strayed upon the railroad track of the defendant at a point * * * where said track was not inclosed by a good and sufficient fence, as the law directs. *Nicholson v. The Hannibal & St. Joseph Railroad Company*, 73.

5. ——— : KILLING STOCK: STATUTORY SIGNALS. In order to render a railroad company liable for injury done to stock at public crossings by its engines and cars, it must be shown that its failure to ring the bell and sound the whistle concurred. Nothing short of an entire failure in both these particulars will cast liability upon the company. *Halferty v. The Wabash, St. Louis & Pacific Railway Company*, 90.
6. ——— : ——— : COLLISION, EVIDENCE OF. Where there is no evidence of a collision between a railroad train and an animal alleged to have been killed by such train, there can be no recovery. But such collision need not be shown by direct testimony, but may be inferred from the facts and circumstances in evidence. *Ib.*
7. ——— : PUBLIC CROSSINGS: SIGNALS. It is the duty of those who handle such dangerous machinery as a railroad train, to be on the lookout, as well as to give the statutory signals, when approaching public crossings. *Ib.*
8. ——— : KILLING STOCK: AMENDMENT OF STATEMENT. Under Revised Statutes, section 3060, a statement in a suit brought against a railroad company before a justice of the peace for double damages for killing stock, can, on appeal to the circuit court, be so amended as to allege that the killing occurred in a township adjoining the one in which the suit was brought. *Mitchell v. The Missouri Pacific Railway Company*, 106; *Kitchen v. The Missouri Pacific Railway Company*, 686.
9. ——— : ——— : EVIDENCE. The evidence must show that the animal was killed in either the township in which the suit is brought or in an adjoining one. *Ib.*
10. ——— : KILLING STOCK: STATEMENT: EVIDENCE. A statement filed before a justice of the peace against a railroad for killing stock, and which is in the form of an account by plaintiff, "for killing three hogs, his property, on the 31st of July, 1881, at Arnold Station, in Gallatin township, Clay county, Missouri, \$22," will admit proof of failure to fence as a ground for recovery, under the 5th section of the damage act. Wag. Stat., p. 520; R. S., § 2124. *Minter v. The Hannibal & St. Joseph Railroad Company*, 128.
11. KILLING STOCK: STATEMENT: AMENDMENT. Such statement is susceptible of amendment, under Revised Statutes, section 3060, so as to allege in terms the absence of a lawful fence where the accident occurred, but the effect of the amendment would be to limit the plaintiff in his proof to the absence of the fence as a ground of recovery. *Ib.*
12. NEGLIGENCE: RAILROADS: KILLING STOCK. In an action against a railroad for negligently running its train against and killing a cow, where the plaintiff only shows the injury and the passing of the train at a rate of twenty or twenty-five miles an hour along the

place of the accident, which was over a tract of land inside of a village, midway between public thoroughfares 900 feet apart, he fails to make a case, and a demurrer to the evidence should be sustained. *Lord v. The Chicago, Rock Island & Pacific Railway Company*, 139.

13. RAILROADS: DOUBLE DAMAGES: STATEMENT. A statement in an action before a justice of the peace, against a railroad for double damages for killing stock, must allege that the stock entered upon defendant's road at a point where it was required to fence, or facts must be stated from which this may be legitimately inferred. Simply alleging that the hogs strayed upon the track of defendant's road at the times and places stated, where the road was not fenced with a good and sufficient fence, and not at any public or private crossing, is insufficient. *Morrow v. The Missouri Pacific Railway Company*, 169.
14. ———: STATUTORY SIGNALS: KILLING STOCK: PRIMA FACIE CASE. Proof of failure of a railroad to ring the bell of its locomotive or to sound its whistle, as required by Revised Statutes, section 806, and of the killing of the stock, which was in a situation to escape if the signal had been given, makes a *prima facie* case against the defendant. *Persinger v. The Wabash, St. Louis & Pacific Railway Company*, 196.
15. CONSTITUTION: RAILROADS: DOUBLE DAMAGE ACT. Section 43 of the railroad law, (Wag. Stat., p. 310,) making railroad corporations liable in double damages for stock killed by their engines and cars in consequence of failure to erect and maintain fences as therein required, is not repugnant to section 20 of article 2 of the constitution of Missouri of 1875, which declares "that no private property can be taken for private use with or without compensation, unless by the consent of the owner." Nor is it repugnant to section 53 of article 4 of that constitution which provides that "the general assembly shall not pass any local or special law * * * granting to any corporation, association or individual any special or exclusive right, privilege or immunity." *Humes v. The Missouri Pacific Railway Company*, 221.
16. ———: ———. The constitutionality of the double damage act, both as regards the State and Federal constitutions, re-affirmed. *Ib.*
17. RAILROADS: KILLING STOCK: CREDIBILITY OF WITNESS. Where, in an action, there are facts in evidence from which the jury may reasonably infer that the injury to the animal was caused by collision with defendant's locomotive, it should not be instructed that the plaintiff could not recover, although the engineer in charge of the locomotive testified for defendant, without being directly contradicted by any other witness, that he saw the animal when it was hurt, and that it ran on to a trestle and jumped therefrom in front of the locomotive, and was not touched by the latter, or by any of defendant's cars. It was for the jury to determine the credibility to be given to the engineer's testimony. *Meyers v. The Union Trust Company*, 237.
18. NEGLIGENCE: RAILROADS: USAGE: PASSENGER. It is competent for the plaintiff to show the usage of a railroad to transport its stock passengers on the top of its train, along the place of the accident, in an action against it for the death of plaintiff's husband, by negli.

gence, who was, at the time of the injury, a passenger on its stock train and on top of one of its cars, and was thrown therefrom by the concussion resulting from the locomotive removing the slack of the train, preparatory to pushing it forward, and was killed. *Tibby v. The Missouri Pacific Railway Company*, 292.

19. RAILROADS: PASSENGER: DEGREE OF CARE. Where a railroad undertakes to transport a stock passenger on the top of its train, it must manage and run the train with skill and prudence in order to prevent him from being thrown off. The degree of diligence and care in running and managing the train, must correspond in a measure with the mode of conveyance adopted by the company and the person to be conveyed. *Ib.*
20. ———: DUTY TO FENCE: LIABILITY. Where a railroad company has once erected fences on the sides of its road, as required by law, it is only liable for negligent failure to maintain such fences, and it is entitled to a reasonable time in which to make repairs, after having knowledge of defects therein, or after such time has elapsed in which, by the exercise of reasonable diligence, it could have had knowledge of such defects. *Young v. The Hannibal & St. Joseph Railroad Company*, 427.
21. ———: DOUBLE DAMAGE ACT. A railroad, in an action under the double damage act for killing stock, cannot base a defense on the condition of the fence at a place other than where the animal escaped on the track. *Coryell v. The Hannibal & St. Joseph Railroad Company*, 441.
22. ———: FENCE: DOUBLE DAMAGES. A railroad is not excused from fencing under the double damage act where its right of way merely abuts upon a town plat, and it does not appear that any streets or alleys of the town abut upon or cross such right of way. *Kirkland v. The Missouri Pacific Railway Company*, 466.
23. ———: KILLING STOCK DOUBLE DAMAGES: STATEMENT. A statement in an action against a railroad company for double damages for killing stock, is sufficient in that regard, if it states facts which necessarily imply that the failure to fence caused the injury complained of. *Thomas v. The Hannibal & St. Joseph Railroad Company*, 538.
24. ———: ———: ———. A tenant whose horse was killed by reason of the failure of the railroad company to fence, in the absence of notice thereof, will not be bound by an agreement between his landlord and the railroad company relieving the latter of its duty to fence in the former's field, and agreeing that the landlord should make no claim for stock killed therein. *Ib.*
25. ———: ILLEGAL FREIGHT CHARGES: PLEADING. In an action against a railroad company under Revised Statutes, chapter 21, article 3, for illegal charges of freight on saw-logs, a petition is sufficient which alleges that plaintiff shipped two car loads of saw-logs over defendant's road a distance of over twenty-five miles and under fifty, that the legal rates were a certain specified sum, that defendant charged and plaintiff paid a different specified sum, being an excess of \$3.20 over the legal rates allowed defendant, and asking

judgment for the latter sum. *Burkholder v. The Union Trust Company*, 572.

26. ——— : SAW-LOGS. Saw-logs belong to class J of Revised Statutes, section 834, regulating freight charges of railroads. *Ib.*
27. CONSTITUTIONAL LAW. The provision of Revised Statutes, section 835, giving the injured party a right of action against a railroad for three times the excess of the legal rate of freight charged by it is constitutional. *Ib.*
28. TAXES: ASSESSMENT OF RAILROAD PROPERTY. Under the act of 1871, (Laws, p. 56; 2 Wag. Stat., p. 1214 b, art. 2,) county assessors were not authorized to assess the lands of railroad companies situated within their counties, but all railroad property was required to be valued and apportioned, as provided by said act, by a special board consisting of the State Treasurer, State Auditor and Register of Lands, and the county courts of the several counties in which such property was situated levied taxes for county purposes upon the apportionment certified to the county clerks of such counties by such special board, as required by law. *State ex rel. Wright v. The St. Louis, Iron Mountain & Southern Railway Company*, 688.

SEE CONDEMNATION OF PROPERTY, 5, 6, 7.

CONSTITUTIONAL LAW, 3.

PLEADING, 4.

REFEREE.

SEE PRACTICE IN SUPREME COURT, 4.

RES GESTAE.

SEE EVIDENCE, 7.

RES JUDICATA.

TRUSTEE: JUDGMENT: RES JUDICATA. A judgment of a court of competent jurisdiction, settling the accounts of a trustee and discharging him from the trust, becomes *res judicata*, and is not subject to collateral attack. *Peake v. Jamison*, 552.

SEE WILLS, 4.

RESULTING TRUSTS.

SEE TRUSTS AND TRUSTEES, 1

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REVENUE.

SEE TAXES.

RIPARIAN RIGHTS.

SEE CONSTITUTIONAL LAW, 4.

ROAD OVERSEER.

SEE PLEADING, CRIMINAL, 4.

ST. LOUIS CRIMINAL COURT.

ST. LOUIS CRIMINAL COURT: JANITOR OF, RIGHT TO APPOINT. Under section 10 of the scheme for the separation of the city of St. Louis from St. Louis county, (R. S., pp. 1565, 1566,) and the ordinance of the city passed thereunder, the commissioner of the public buildings of said city, and not the St. Louis criminal court, has the right to appoint a janitor for said court. *The State ex rel. Howard v. Smith*, 51.

ST. LOUIS COURT OF APPEALS.

SEE APPEALS, 2.

JURISDICTION, 3.

SALE.

1. SALE: STOPPAGE IN TRANSITU. Where the vendee of goods becomes insolvent while they are *in transitu*, the vendor has the right to stop their delivery; and such right can be exercised until actual delivery to the vendee, or circumstances equivalent thereto. *Heinz v. Railroad Transfer Company*, 233.
2. ———: ———, Such right of stoppage *in transitu* exists, although the sale be conditional or on credit. *Ib.*
3. SALE, MOTION TO SET ASIDE: MISTAKE OF OFFICER. A sheriff's sale will be set aside at the return day thereof for the mistake and oversight of the officer in making it, when shown to have operated injuriously to the interests of the complainant. *McKee v. Logan*, 524.
4. SALE, MOTION TO SET ASIDE: NOTICE. All persons interested should have notice of a motion to set aside a sheriff's sale, otherwise their rights will in no manner be affected by the proceeding. But where the officer who made the sale has no direct interest in its maintenance, notice to him would not seem to be necessary. *Ib.*

5. — : —. Where the purchasers at the execution sale are present and resist the motion to set the same aside, they cannot be heard to complain of want of notice to the sheriff and the plaintiff in the execution. *Ib.*

SEE ADMINISTRATION, 4.

CONTRACTS, 3, 4, 5, 6.

FRAUD, 1.

LAND AND LAND TTLES, 4.

LANDLORD AND TENANT, 2.

TAXES, 8.

TRUSTS AND TRUSTEES, 6, 7, 9.

SEDUCTION.

1. SEDUCTION UNDER PROMISE OF MARRIAGE: PARTY. The injured woman alone can maintain an action for seduction, accomplished under a breach of promise of marriage. *Comer v. Taylor*, 341.
2. SEDUCTION: ACTION BY PARENT FOR LOSS OF SERVICE: EVIDENCE. Proof of promise of marriage is not permissible in an action by a parent for the loss of service of his daughter caused by her seduction. *Ib.*
3. — : — : —. There can be no recovery by the parent in such action, unless the defendant is the father of the child. *Ib.*
4. DAMAGES: SEDUCTION: MEDICAL ATTENDANCE. In such action the parent will be entitled to recover for medicine and medical attendance, if reasonable, whether he has paid the sum due therefor or not. *Ib.*
5. — : — : MISCONDUCT OF THE WOMAN. Where the carnal intercourse is occasioned as much by the misconduct of the woman as that of the man, there can be no exemplary damages. *Ib.*
6. SEDUCTION: DAMAGES. No recovery can be had for the wounded feelings of plaintiff's family in an action for seduction of his daughter, based on the loss of her service. *Ib.*

SHERIFF.

1. EXECUTION: SHERIFF: LEVY, TIME OF. As a general rule, a sheriff who has an execution in his hands has until the return day of the writ within which to execute it. There may, however, be special

circumstances which will require an immediate levy in order to make the process available. *The State ex rel. Farwell v. Leland*, 260.

2. ———: ———: ———. It is the duty of the sheriff to make the levy within a reasonable time, in view of all the facts and circumstances of the case. *Ib.*

SHERIFF'S DEED.

SEE DEEDS, 12.

SIGNIFICATION OF TERMS.

INDEPENDENT CONTRACTOR. *Fink v. The Missouri Furnace Company*, 276.

SLANDER.

1. ACTION, ABATEMENT OF. An action for slander does not abate, pending an appeal to the Supreme Court, by reason of the death of plaintiff in whose behalf the judgment was rendered. *Lewis v. McDaniel*, 577.
2. SLANDER. Words charging that plaintiff was a thief and had stolen hogs, impute a felonious offense, and are actionable *per se*. *Ib.*
3. SLANDEROUS WORDS, PROOF OF. All the slanderous words charged need not be proved. It is sufficient if those proved contain the poison to the character and constitute the precise charge of slander alleged. *Ib.*
4. INSTRUCTION: QUANTUM OF PROOF. An instruction in this case held not erroneous because it authorized a verdict for the plaintiff, if the jury should find that enough of the exact words charged to substantially constitute the charge imputed were spoken. *Ib.*
5. SLANDER: PLEADING. In an action for slander words spoken on different occasions may be set forth in one count, and included in the same cause of action. *Ib.*

SPECIAL TAX BILLS.

SEE MUNICIPAL CORPORATIONS, 9.

SPECIFIC PERFORMANCE.

1. EQUITY: STATUTE OF FRAUDS: SPECIFIC PERFORMANCE. Where one in pursuance of and on the faith of an oral promise of the owner that he shall have a deed for land, enters into possession and makes valuable improvements, the case is taken out of the statute of

frauds, and he is entitled to a decree for specific performance. *Anderson v. Shockley*, 250.

2. SPECIFIC PERFORMANCE: LAND: PLEADING. In an action for the specific performance of a contract to sell land, plaintiff need not allege the contract is in writing. *The Young Men's Christian Association of Kansas City v. Dubach*, 475.
3. PRACTICE: INSTRUMENT SUE ON: STATUTE. The statute, (R. S., § 3560,) requiring the instrument of writing sued on to be filed with the petition, unless it is lost or destroyed, does not apply to such action. *Ib*.
4. ———: ———: ———: POWER TO HOLD LAND: DEFENSE. The incapacity of a corporation, in a suit by it for the specific performance of a contract to sell land, to purchase and hold the same is a matter of defense. *Ib*.

STATUTES CONSTRUED.

REVISED STATUTES OF 1879.

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 Section 489, see page 213.
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 Section 809, see pages 37, 237.
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 Section 3897, see page 46.
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WAGNER'S STATUTES, 1872.

Page 291, § 13, see page 301.

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ACTS OF 1871.

Page 56, see page 683.

ACTS OF 1874.

Page 336, § 1, see page 309.

ACTS OF 1875.

Page 61, § 1, see page 200.

ACTS OF 1883.

Page 80, § 1, see page 491.

STATUTE OF FRAUDS.

STATUTE OF FRAUDS: PROMISE TO DEBTOR TO PAY HIS DEBT. A promise made to a debtor of a third person to pay the debt for him, if founded on a new and valid consideration, is not within the statute of frauds, and the creditor can sue the promisor directly on the

agreement; but it is otherwise if the promise is made to the creditor himself. *Green v. Estes*, 337.

SEE CONTRACTS, 3

EQUITY, 1.

PLEADING, 3.

STOPPAGE IN TRANSITU.

1. SALE: STOPPAGE IN TRANSITU. Where the vendee of goods becomes insolvent while they are *in transitu*, the vendor has the right to stop their delivery; and such right can be exercised until actual delivery to the vendee, or circumstances equivalent thereto. *Heins v. The Railroad Transfer Company*, 233.
2. ———: ———. Such right of stoppage *in transitu* exists, although the sale be conditional or on credit. *Id.*

SUBROGATION.

PRINCIPAL AND SURETY: SUBROGATION. A surety for the trustees on their note for the payment of money advanced to build the church, who pays the obligation of his principals, is entitled to be subrogated to the rights of the trustees to subject the church to the payment of the debt. *Bushong v. Taylor*, 660.

SWAMP LANDS.

SEE LAND AND LAND TITLES, 3.

TAXES.

1. REVENUE: ASSESSOR'S BOOK: VERIFICATION. Wagner's Statutes, section 61, p. 1170, relating to assessment of revenue, authorizes but one tax book, which shall contain the lists of both real and personal property, and where the assessor made out for the year 1873 a book for each kind of property, but failed to verify the land book, the assessment for such year was invalid. *State ex rel. Harvey v. Cook*, 185.
2. ASSESSMENT OF LAND, WHEN BASED ON FORMER YEAR: NEW BOOK. Although the law provides that an assessment of land shall stand good for two years, and that the assessment of the second year shall be based on the first, yet such assessment, when based on the former one, has to be made out in a new book, and the old one returned to the clerk of the county court. *Id.*
3. INVALID ASSESSMENT. The assessment for the second year in this case, held invalid for two reasons: 1st, Because there was no legal

assessment for the first year, the assessor having failed to verify it by his affidavit as required by law; 2nd, Because the assessor made out no new land book for the second year as required by said section 61, Wagner's Statutes, p. 1170. *Id.*

4. **TAX DEED: DESCRIPTION OF LAND.** The description of the land in a tax deed must conform to that contained in the anterior proceedings. *Lowe v. Ekey*, 286.
5. ———: **ABBREVIATIONS: STATUTE.** Under Wagner's Statutes, page 1212, section 240, authorizing certain abbreviations in describing land in tax deeds and proceedings relating to the same, abbreviations can be used only as provided in said section, and when used they will be insufficient under said section, unless the land intended to be designated by their use is so designated thereby that it may be identified or located. *Id.*
6. ———: ———. Abbreviations used in description of land in the tax deed and anterior proceedings in this case, held insufficient. *Id.*
7. **TAXES: LIEN OF THE STATE FOR SUPERIOR: JUNIOR OR INFERIOR INCUMBRANCE: EJECTMENT.** The lien of the State for taxes takes precedence of and is superior to all other liens, whether prior or subsequent. But in a suit to enforce such lien, the holder of a junior or inferior incumbrance must be made a party, if it is desired to divest him of his rights; otherwise he will be entitled to redeem from the purchaser under the superior or tax lien. And the trustee is not a competent party to foreclose by suit, without joining the beneficiary with him. But the purchaser under the superior lien has the superior legal title, which the holder of the junior or inferior lien cannot successfully resist in an action of ejectment for the recovery of possession. *Stafford v. Fizer*, 393.
8. **TAXES, SALE OF LAND FOR: STATUTE.** The assessment and other proceedings under the act of the legislature of 1864, (Acts 1863-4, p. 84,) relating to the sale of land for taxes, must have been against the owner of the property. *Gaines v. Fender*, 497.
9. **TAXES: ASSESSMENT OF RAILROAD PROPERTY.** Under the act of 1871, (Laws, p. 56; 2 Wag. Stat., p. 1214 b, art. 2,) county assessors were not authorized to assess the lands of railroad companies situated within their counties, but all railroad property was required to be valued and apportioned, as provided by said act, by a special board consisting of the State Treasurer, State Auditor and Register of Lands, and the county courts of the several counties in which such property was situated levied taxes for county purposes upon the apportionment certified to the county clerks of such counties by such special board, as required by law. *State ex rel. Wright v. The St. Louis, Iron Mountain & Southern Railway Company*, 688.

SEE LAND AND LAND TITLES, 4.

MUNICIPAL CORPORATIONS, 9.



TENANT AT WILL.

SEE LANDLORD AND TENANT, 4.

TITLE.

SEE CONDEMNATION OF PROPERTY, 2.

LIMITATIONS, 6, 7.

TRESPASS.

MUNICIPAL CORPORATION: TRESPASS: PEST-HOUSE. Where a city, which is authorized by its charter to purchase property beyond its limits for a pest-house, seizes property for that purpose without the consent of the owner, it is liable in damages for the trespass. *Dooley v. The City of Kansas*, 444.

TROVER.

1. **TROVER: OWNERSHIP.** Plaintiff in an action for trover and conversion must show either general or special property in the thing converted. *The Southworth Company v. Lamb*, 242.
2. **PLEDGE: PAWNOR'S INTEREST, SALE OF: TROVER.** The pawnor of a chattel, notwithstanding his pledge, has still a vendible interest in it, and the vendee of such interest can maintain trover against the pawnee, if the latter refuses to deliver it to him on his tendering the amount of the debt. *Ib.*

TRUSTS AND TRUSTEES.

1. **HUSBAND AND WIFE, MONEY OF LATTER: RESULTING TRUST, EVIDENCE TO ESTABLISH.** Prior to the act of 1875, money of the wife, not her separate estate, became the property of the husband *jure mariti*, and if invested in land by him, no resulting trust would be thereby created in favor of the wife or those claiming under her. To establish such a trust the evidence must be clear, strong and unequivocal; loose declarations of the husband are not sufficient, and testimony of verbal admissions of persons since dead is entitled to but small weight. *Modrell v. Riddle*, 31.
2. **TRUSTEES' INVESTMENTS: MAL-ADMINISTRATION.** Where a trustee makes an investment in his private capacity, and fails to indicate promptly that his investment is on account of the estate he has in charge, he, thereby, subjects himself to well grounded suspicion of mal-administration upon claiming it to have been on account of the estate, after loss or depreciation of the security taken by him. *The State to the use of Koch v. Roeper*, 57.
3. **TRUSTEE: JUDGMENT: RES JUDICATA.** A judgment of a court of competent jurisdiction, settling the accounts of a trustee and dis-

charging him from the trust, becomes *res judicata*, and is not subject to collateral attack. *Peake v. Jamison*, 552.

4. **TRUSTEE, LIABILITY OF.** A trustee is not chargeable with delinquency in failing to institute suit against a prior trustee for loss to the estate, resulting from the non-payment of taxes by the latter, when both he and his surety were insolvent at the time the defendant first learned of the neglect to pay the taxes. *Ib.*
5. **HUSBAND AND WIFE: LAND, PURCHASE OF IN PART WITH WIFE'S MONEY: TRUST.** A husband received from his wife money arising from the sale of her real estate, under an agreement to invest it in land in her name. He purchased land, paying for it in part with her money and in part with his own and took the title in his own name; *Held*, that the wife was entitled to have in her own right, exempt from subjection to the husband's debts, such portion of the land as the amount of her money paid thereon bore to the whole sum paid. *Boven v. McKean*, 594.
6. **DEED OF TRUST: SALE: TENDER.** A tender before sale of the interest due without the principal, is sufficient to prevent a sale by a trustee under a deed of trust, although the latter provides that, in case of failure to pay the interest as it becomes due, the entire debt, principal and interest, shall mature, and the property be sold to pay the same. *Philips v. Bailey*, 639.
7. **——: TAXES: DEFAULT: SALE.** Where a deed of trust provides that the debtor shall pay the taxes on the property conveyed, and in case of default in that regard, the debt, principal and interest, shall mature and the property be sold to pay the same, the trustee, on the payment before sale of the taxes, should not sell. *Ib.*
8. **INSURANCE. CESTUI QUE TRUST: DEFAULT.** Where a deed of trust provided, that the debtor should keep the property insured, but the creditor retained, for that purpose, out of the loan a sum sufficient to pay the insurance during the period of the loan, and the debtor did not learn of the failure of the creditor to effect the insurance until after the property was burned; *Held*, that the debtor was not in default as to such insurance. *Ib.*
9. **DEED OF TRUST, STIPULATIONS OF: ATTORNEY'S FEE.** An attorney's fee stipulated in a deed of trust to be paid out of the proceeds of the sale of the property to pay the debt, cannot be demanded before sale. *Ib.*
10. **METHODIST EPISCOPAL CHURCH: TRUSTEES, POWER OF.** The trustees of a local church of the Methodist Episcopal Church in the United States, have authority, under its book of discipline, to mortgage or sell the church premises for the payment of money which the trustees have advanced or become responsible for to build the church. *Bushong v. Taylor*, 660.
11. **——: ——.** Where the trustees refuse to exercise such power to sell, a court of equity will enforce the sale. *Ib.*
12. **TRUSTEES OF CHURCH SIGNING NOTE AS INDIVIDUALS: LIABILITY.** Although the trustees did not add the designation of their office to

their names on the note which they executed for the money advanced to build the church, yet as between them and the church, the note was the obligation of the latter, it appearing from the evidence that their signatures were made individually in order that the note might be disposed of to raise the money for the church. *Ib.*

13. **METHODIST EPISCOPAL CHURCH: UNINCORPORATED LOCAL CHURCH: TRUSTEES.** The local church in this case being an unincorporated voluntary association, the trustees, from the nature of the government of the Methodist Episcopal Church, were the agents of the aggregate body of members, and of each member to the extent of his beneficial interest in the church property, in respect to debts contracted by the trustees for the benefit of the church premises. *Ib.*
14. **PRACTICE: NECESSARY PARTIES.** The trustees are the only necessary parties defendant in a suit in equity, to enforce the debt against the church property. *Ib.*
15. **PRINCIPAL AND SURETY: SUBROGATION.** A surety for the trustees on their note for the payment of money advanced to build the church, who pays the obligation of his principals, is entitled to be subrogated to the rights of the trustees to subject the church to the payment of the debt. *Ib.*

SEE LAND AND LAND TITLES, 5.

USAGE.

SEE RAILROADS, 18.

VARIANCE.

PLEADING, CRIMINAL: INDICTMENT: FRAUD: OWNERSHIP: VARIANCE. An indictment under Revised Statutes, section 1561, for obtaining property by means of a trick and fraud, should charge it to belong to the true owner. But a variance in this particular upon the trial will not, under the statute, (R. S., § 1820,) be fatal, unless the trial court shall find it to be material to the merits of the case, or prejudicial to the defense of the defendant. *State v. Myers*, 558.

SEE CONTRACTS, 6.

VENDOR'S LIEN.

SEE LIEN, 4, 5.

VENDOR AND VENDEE.

SEE CONTRACTS, 1.

SALE, 1, 2.

VENUE.

CHANGE OF VENUE: PLAINTIFF'S APPLICATION, TIME FOR MAKING. A plaintiff who asks for a change of venue because of the alleged undue influence of the defendant over the mind of the trial judge, must make his application therefor as soon as practicable, after receiving information of the undue influence complained of. Whether the application is so made within proper time, is a question resting in the sound discretion of the trial judge. *The State to the use of Stewart v. Matlock*, 465.

SEE PRACTICE, CRIMINAL, 3.

VERDICT.

VERDICT: CLERICAL ERROR. A clerical error, and which is harmless in drafting a verdict, will be disregarded. *Holmes v. Braidwood*, 610.

SEE PRACTICE, CIVIL, 4.

WAIVER.

STATUTE OF LIMITATIONS: WAIVER OF BENEFITS OF: TITLE. An agreement made after title has been perfected by operation of the statute of limitations to waive the benefits of the statute, is not effective, but the title remains in the party, who has thus acquired it, until he conveys it back with all the solemnities required in any deed to land. *Allen v. Mansfield*, 688.

SEE GUARDIAN AND WARD, 2.

PLEADING, 5.

PRACTICE, CIVIL, 4.

WARRANTY.

VENDOR: VENDEE: CONTRACT: WARRANTY. Where a vendee buys a number of cattle, and by the terms of the contract of sale they are to be weighed upon the vendor's scales, and paid for according to the weight as determined by said scales, there is an implied warranty on the part of the vendor that such shall be lawful scales, and capable of indicating lawful weights, and the vendor is liable to the vendee for all money paid him by the latter by reason of excessive weights, as indicated by the defective scales, although there was no pretense of actual fraud on the part of the vendor. *Clifton v. Sparks*, 115.

WILLS.

1. **WILL, CONSTRUCTION OF.** A will construed in connection with extrinsic evidence and held that the guardian of a minor, where certain

bequests were made to the latter, and not the administrator of the estate, was entitled to their possession. *Landis v. Eppstein*, 99.

2. FOREIGN WILL: EVIDENCE. A will of a sister state is not inadmissible in evidence here, because it has not been admitted to probate or recorded in the probate court of this state. *Gaines v. Fender*, 497.
3. ———: ———. The will in this case, which was made in Kentucky, *Held* admissible in evidence here, against the objection that its admission to probate in Kentucky was not sufficiently authenticated. *Ib.*
4. FORMER APPEAL: RES JUDICATA. The decision of this court in this cause, when here on a former appeal, (57 Mo. 342,) as to the sufficiency of the will to pass title to the land involved in this suit, is *res judicata*. *Ib.*
5. WILL: POWER TO SEVERAL AS EXECUTORS, EXECUTION OF. Where a power in a will to sell land is given to several as executors, and not as persons, all need not act. The survivor or survivors may, in such case, lawfully execute the power. *Ib.*

SEE CORPORATIONS, 9.

WITNESSES.

WITNESS: CONVICT: STATUTE. Under the Revised Statutes of 1879, one under a sentence for robbery is a competent witness in behalf of a defendant jointly indicted with him. *State v. Loney*, 82.

SEE RAILROADS, 17.

RULES FOR THE GOVERNMENT
OF THE
SUPREME COURT OF MISSOURI,

Adopted at the April Term, 1877.

Chief Justice, his duty.

RULE 1. The Chief Justice shall superintend matters of order in the court room.

Motion to be written, signed and filed.

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3. No motion shall be argued unless by the direction of the court.

Taking record from clerk's office.

RULE 4. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

Diminution of record, suggestion after joinder in error.

RULE 5. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 6. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four

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hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Notices of writs of error.

RULE 7. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Reviewing Instructions.

RULE 8. In actions at law it shall not be necessary for the purpose of reviewing in the Supreme Court the action of any circuit court or any other court, having, by statute, jurisdiction of civil cases in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient for the purpose of such review that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 9. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 10. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such

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fact or issue, and except to the opinion of the court that it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

Exceptions to admission or exclusion of evidence.

RULE 11. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Bill of exceptions in equity cases.

RULE 12. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

Rule as to making out transcripts.

RULE 13. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not, (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause,) in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.) "summons issued October 2, 1871, executed October 5, 1871," and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Presumptions in support of bills of exceptions.

RULE 14. The only purpose of a statement, in a bill or exceptions, that it sets out all the evidence in a cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall

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be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Abstracts and briefs to be filed.

RULES 15 and 16 (as consolidated and amended at the April term, 1884). In all cases the appellant or plaintiff in error shall file with the clerk of this court on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for the respondent or defendant in error, at least *thirty* days before the day on which the cause is docketed for hearing; and the counsel for the respondent or defendant in error shall, at least *ten* days before the day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall on or before the day next preceding the day on which said cause is docketed for hearing, file with the clerk of this court seven copies of the same, and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the clerk.

Citing authorities in briefs.

RULE 17. In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume

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and the page where the same will be found ; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging and side paging shall be set forth.

Appellant's brief to allege errors complained of.

RULE 18. The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown the court shall otherwise direct.

Failure to comply with rules 15 and 16.

RULE 19. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error ; or at the option of respondent or defendant in error, continue the cause at the costs of the party in default.

Agreed cases.

RULE 20. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed ; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the Supreme Court respecting the same.

Motion for rehearing.

RULE 21. Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or

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with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

Motion for affirmance.

RULE 22. On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents a copy of the transcript at the time such motion is made, shall not of *itself* be deemed "good cause" within the meaning of said section.

Former rules rescinded.

RULE 23. All rules not included in the foregoing enumeration are hereby rescinded.

ADDITIONAL RULES.

RULE 24. No writ of error from this court to the court of appeals can be issued by the clerk of this court in vacation. All applications in term time for writs of error to the court of appeals, shall be accompanied by an affidavit of the attorney of record that the cause in which such writ of error is sued out, is one of which this court has appellate jurisdiction under section 12, of article 6 of the constitution; and such affidavit shall state the facts conferring such jurisdiction, and thereupon the clerk shall issue such writ. (*Adopted at the April term, 1878.*)

RULE 25. That hereafter, in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause. (*Adopted at the October term, 1878.*)

RULE 26. A party, in any cause, filing a motion either

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to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given. (*Adopted at the October term, 1879.*)